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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1494

KENNETH CLARK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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STATEMENT

Petitioner, KENNETH CLERK, petitions this Court for a writ of certiorari to the United States Court of Appeals for the Second Circuit, to review its affirmance of a judgment of the United States District Court for the Eastern District of New York, convicting the petitioner of importation of heroin in violation of 21 U.S.C. Sec. 952(a); 960(a)(1) after trial before HON. EUGENE H. NICKERSON and a jury. A jury in a prior trial deadlocked on the same counts but acquitted petitioner, KENNETH CLARK, of conspiracy to distribute and import narcotics in violation of 21 U.S.C. Sec. 846.

The judgment was affirmed on December 28, 1979 and a motion for rehearing was denied on February 27, 1980.

OPINION BELOW

The extensive opinion of the United States Court of Appeals, Second Circuit, is reproduced as an appendix to this petition.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1). The Court below rendered its initial decision affirming the judgment of conviction on December 28, 1979. A petition for rehearing was then considered by the United States Court of Appeals for the Second Circuit, but was ultimately denied on the 27th day of February, 1980. (The Orders thereon are reproduced in the appendix, *infra*).

QUESTIONS PRESENTED

1. Whether acquittal of conspiracy in a Criminal Trial (Trial I) barred the use of co-conspirator's statements on a *de novo* Trial II where defendant was being tried solely on importation charges? (Fifth Amendment, United States Constitution—Due Process; Double Jeopardy).

2. Whether acquittal of conspiracy in Trial I barred the retrial of petitioner on importation charges in Trial II on grounds of collateral estoppel? (Fifth Amendment, United States Constitution—Double Jeopardy).

3. Whether the District Court's supplemental charge to the jury on aiding and abetting, by giving specific examples of purported facts from the trial testimony in a trial of but two (2) days duration where the original jury

charge and prior supplemental charges failed to marshal the evidence was so prejudicial as to deny petitioner a fair trial? (Fifth Amendment, United States Constitution—Due Process; *Quercia v. United States,* 289 U.S. 466).

4. Whether the summation of the Prosecutor was so prejudicial because of improper suggestions, insinuations and assertions of personal knowledge as to constitute prosecutorial misconduct requiring reversal? (Fifth Amendment, United States Constitution—Due Process; *Berger v. United States,* 295 U.S. 78).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment of the United States Constitution; 21 U.S.C. Secs. 952 and 960 and Rule 801(d)(2)(E), Federal Rules of Evidence are involved.

FACTUAL BACKGROUND

On February 2, 1979, a jury found KEN CLARK guilty of violation of 21 U.S.C. 952(a) and 960(a)(1) (two counts). More specifically, the verdict affirmed the accusation found in the indictment that Petitioner imported heroin into the United States on or about the 14th day of July, 1977, and also on or about the 27th day of September, 1977. ERIC ROMANDI who was tried together with Petitioner was also found guilty of one count charging him with heroin importation on the September date.

This was the second trial for CLARK (and ROMANDI).

It should be noted that while the prosecution was against both KENNETH CLARK and ERIC ROMANDI, only KENNETH CLARK is pursuing this Petition to the Supreme Court of the United States.

Turning the clock back to March and April, 1978, indictment 135CR78, as twice superceded, accused sixteen persons of conspiracy to import heroin from Bangkok. In addition, each of those named were charged with a variety of substantive crimes. For a period of approximately nine weeks during September and October, 1978, CLARK and twelve others participated first in pretrial hearings and then in a jury trial.

After seven days of deliberation (12 calendar days) the jury acquitted CLARK of conspiracy to import heroin but was unable to agree on the charge of importation. A mistrial was granted and a new trial ordered. ROMANDI and one, DORIS JACKSON, were also acquitted of the conspiracy and the jury was likewise unable to decide on the substantive charge. This lengthy deliberation by the jury concluded with the further finding that three of the remaining ten defendants were guilty of conspiracy to import heroin. No verdict could be reached by this jury as to any count concerning the seven other defendants.

As a result of this verdict, the Government was prepared to retry all defendants with the exception of the three found guilty of conspiracy by the jury. Substantive charges against these three convicted conspirators were dismissed and they were sentenced solely on their conviction for conspiracy. In fact, CHARLES PRAETORIUS, whose co-conspirator statements are the subject of a major part of this Petition, is alleged to have been the organizer and leader of the conspiracy although he was acquitted of the main count charging him with violation of 21 U.S.C. Sec. 848. (DIANN PRAETORIUS and LOUIS JUAN formed the balance of the conspiratorial trio).

Before the retrial, the District Court, on motion, severed the cases of CLARK, ROMANDI and JACKSON from the seven other remaining defendants and, further ordered separate trials as follows: CLARK and ROMANDI together; DORIS JACKSON separately.

Thus, this Petition concerns itself with two counts of a lengthy indictment and ROMANDI was charged in but one count although joined with CLARK for trial purposes.

The retrial was comparatively short and took a total of five days, including one and one-half days of jury deliberation to which reference will be further made.

During the first trial the co-conspirator exception to the hearsay rule embodied in 801(d)(2)(E) FRE was frequently utilized by the Government and witnesses repeatedly related conversations purportedly had with CHARLES PRAETORIUS (the alleged organizer) concerning the various defendants, including Petitioner. (As has been noted, CHARLES PRAETORIUS was a defendant in the first trial and while he sat at the defense table, his statements were heard by the jury although he never took the stand).

Prior to jury selection, and during the course of Trial II this co-conspirator exception was the subject of motion to exclude, motions to strike and continuing objections to the introduction of such testimony by CLARK'S counsel. It became clear from the outset of this retrial that the Government intended to use the PRAETORIUS co-conspirator testimony against CLARK even though he had been acquitted of the conspiracy and was being tried on substantive counts of importation. Notwithstanding defense protestations that the particular posture of this case (*acquittal and separate trial*) mandated the exclusion of such testimony, the trial Judge allowed same and a great deal of testimony was heard by the jury concerning what PRAETORIUS allegedly told Government witnesses, RALPH ABRUZZO and GLENSTON PAGE LAWS. (T8-30).[1]

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1. Numerals in parenthesis refer to pages of the Official Court Reporter's Minutes. Reference to T8-30 is to proceedings wherein motions were argued prior to jury selection.

In this connection a reading of the transcript of trial sets forth, especially during ABRUZZO'S testimony, the continued use of the PRAETORIUS statements. These statements are found *inter alia,* at the following pages of the transcript: 40, 41, 43, 46, 47, 51, 53, 54, 57, 58, 60, 61, 69, 71, 73, 74, 76, 78, 79, 80, 87, 89, 90, 91, 92,[2] 98, 99, 101, 103, 105, 106, 110.

Furthermore, the testimony of GLENSTON PAGE LAWS at pages 395, 396, 398 and 503 likewise recites conversations had with MR. PRAETORIUS.

Basically, ABRUZZO and LAWS gave testimony which was substantially similar to that at Trial I but additional statements were also attributable to PRAETORIUS at the retrial. The jury heard from ABRUZZO that CHARLES PRAETORIUS told him that "KENNY CLARK would carry approximately a half kilo" (43); that "CHARLES called me at my house and told me that he had just picked up a package from KENNIE (sic) CLARK near LaGuardia airport by Travellers Hotel" (69); that CHARLIE PRAETORIUS wanted to pay KENNIE (sic) CLARK and that he paid a total of $41,000." (71)

Additionally, ABRUZZO testified that PRAETORIUS told him that insofar as the September trip was concerned, that "KENNY CLARK was going to be on the September trip for himself"; that "KENNY CLARK was going to buy a kilo of heroin and bring it back himself and CHARLES PRAETORIUS would sell it for him and pay him for it" at a rate of $4,000 an ounce for a kilo" (76). Further, ABRUZZO stated that CHARLIE told him "that he picked up the package that KENNY CLARK had brought back from the Travellers Hotel". (106).

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2. In addition, statements of DIANE PRAETORIUS, wife of CHARLES, were also testified to by ABRUZZO and allowed as statements of a co-conspirator.

SUMMATION

Summation by the Government was objected to on several occasions by counsel for the Petitioner. The trial record, expressly at pages 576, 580, 586-87, 589-90 and 659, 660 illustrate clear overstepping of the bounds of advocacy on the part of the United States Attorney. Expressions of opinion such as *"if it was not true," "unless it was true," "it is believable"* and *"the evidence is credible"* abound in this record. It is noteworthy that the Circuit Court accepted Petitioner's contention that "vigorous prosecution of a criminal offense imposes constraint against improper suggestions, insinuations and, especially, assertions of personal knowledge."

SUPPLEMENTAL CHARGE

AFter the jury was deliberating almost two days (about the same time as the total testimony at the trial) they posed the following question to the Court:

> "If a person went somewhere with the intention of participating—is that aiding and abetting? Can we have aiding and abetting expanded upon?" (743)

Vehement objection by counsel for Petitioner failed to convince the District Judge of the incorrectness and inherent prejudice of the following supplemental charge: (746-747)

> "Now, what you have to do is apply those instructions to the facts of this case. That means, for example, that if you find beyond a reasonable doubt that a defendant flattened out any of the plastic bags into which the heroin was packaged, or that he broke up the vials in which the heroin was packaged for the purpose of disposing of them, or

handed the scissors or the plastic bags to others during the packaging process, or he undressed himself and permitted himself to be taped in the presence of others, thereafter in the presence of others departing the hotel room taped with the heroin. Those acts—and I'm just giving you those examples. If you found them beyond a reasonable doubt to have been performed, would be aiding and abetting. But remember now what I told you that they would have to be done with the requisite intention and knowledge and wilfullness as I have charged it to you.

All right, I hope that will be helpful to you. Will you go and continue your deliberations please?"

Petitioner maintains that certiorari should be granted not only because of the obvious failure to accord him a fair trial within the purview of the Due Process clause of the Fifth Amendment to the United States Constitution, but also because of the need to clearly articulate a prohibition against the use of co-conspirators statements, in a new trial, after a prior acquittal of conspiracy under Sec. 801(d)(2)(E) FRE.

In addition, it has been thought that embodiment of the doctrine of collateral estoppel in the Fifth Amendment guarantee against Double Jeopardy prohibited the "untested" statements (obviously rejected in Trial I) from being heard again by the jury in Trial II (*ASHE v. SWENSON*, 397 U.S. 436). As a corollary, collateral estoppel should have barred the second trial, *ab initio.*

Moreover, in a close case such as the one at bar, the highly prejudicial summation by the Prosecution coupled with the supplemental charge on aiding and abetting which marshalled evidence when none had been marshalled in the main charge, or in the prior supplemental charges, clearly violated Petitioner's right to a fair trial guaranteed by the United States Constitution.

We incorporate by reference the Briefs submitted to the Court below.

REASONS FOR GRANTING THE WRIT

I

THE INTRODUCTION OF STATEMENTS OF CO-CONSPIRATORS IN A *DE NOVO* SECOND TRIAL AFTER PETITIONER WAS ACQUITTED OF CONSPIRACY ON A PRIOR TRIAL WAS BARRED ON GROUNDS OF COLLATERAL ESTOPPEL.

That Petitioner CLARK was acquitted of conspiracy in Trial I is not, in the least, questioned, contravened or doubted. That principles of Double Jeopardy (or *autrefois acquit*) forever bars his retrial on this charge, is accepted by all and no one would ever think of challenging this Fifth Amendment concept.

Notwithstanding the obviously irrefutable legal conclusion that the Government is forever barred from retrying Petitioner for conspiracy, the record facts, as confirmed by the Circuit Court, demonstrate that, *for all practical purposes,* CLARK was retried for conspiracy in his second trial.

Generous amounts of statements of co-conspirator, CHARLES PRAETORIUS, were heard by the jury in CLARK'S second trial for importation. In actuality, the only real difference between the proof in Trial I and Trial II, as to Petitioner CLARK, was the absence of a count in the indictment charging conspiracy and a charge to the jury on that point! Realistically, a retrial on conspiracy took place. What other conclusion can be drawn when the district Court refused to bar the statements of co-conspirators? The conspiracy acquittal was completely ignored.

The Court below bases its affirmance on this issue on the doctrine enunciated in *United States v. Geaney,* 417

F.2d 1116 (2d Cir. 1969) cert. denied sub. nom. *Lynch v. United States,* 397 U.S. 1028 (1970) and *United States v. Stanchich,* 550 F. 2d 1294 (2d Cir. 1977). It was postured below that the standard for submission of a conspiracy count to a jury requires a higher test (guilt beyond a reasonable doubt) than does the threshold determination by the trial Judge (on admissibility of a statement of a co-conspirator) whether a defendant's participation in the conspiracy exists by a "fair preponderance of the evidence independent of hearsay utterances." (Whether this standard is still correct under Rule 104(a) FRE is open to question).

The Court found that there was direct evidence to sustain a finding that Petitioner participated in the conspiracy and, accordingly, on the threshold issue of "admissibility," allowed the infectious statements of CHARLES PRAETORIUS and, to a lesser degree of DIANN PRAETORIUS to be heard by the jury.

This error so pollutes the trial that a grant of certiorari is warranted to allow Petitioner to pursue this vital question.

In *United States v. Nixon,* 418 U.S. 683, 701 n. 14, (1974) this Court stated as follows:

> "Declarations by one defendant may also be admissible against other defendants upon a sufficient showing, by independent evidence,[14] of a conspiracy among one or more other defendants and the declarant and if the declarations at issue were in furtherance of that conspiracy."

Footnote 14 contained the following important language:

> "As a preliminary matter, there must be substantial, independent evidence of a conspiracy, at least enough to take the question to the jury . . . Whether the standard has been satisfied is a question of admissibility of evidence to be decided by the trial judge." (citation omitted)

The Fifth Circuit, in one of the most recent rulings on the subject, has followed this Court's interpretation of the high standard required to admit a co-conspirator's statement. *United States v. James,* 590 F 2d 575, 581 (5th Cir. 1979), cert. den. ____U.S.____ 99 S. Ct. 2836; 61 L. Ed. 2d 283. It was said:

> "Because of our conclusion, discussed below, that the trial court's threshold determination of admissibility is normally to be made during the presentation of the government's case in chief and before the evidence is heard by the jury, it is more appropriate to adopt a "substantial" evidence rule rather than one which requires, at that stage of the proceedings, a "preponderance" of the evidence. We conclude that, as stated by the court in *Nixon, supra,* a declaration by one defendant is admissible against other defendants only when there is a "sufficient showing, by independent evidence, of a conspiracy among one or more other defendants and the declarant, and if the declarations at issue were in furtherance of that conspiracy," 418 U.S. at 701, 94 S. Ct. at 31]4, 41 L. Ed. 2d at 1060, and that "as a preliminary matter, there must be *substantial, independent* evidence of a conspiracy at least enough to take the question to the jury." *Id.* at 701 n. 14, 94 S. Ct. at 3104 n. 14, 41 L.Ed.2d at 1060 n. 14, sis added)."

Thus, the Second Circuit's reliance on *Geaney, supra* and *Stanchich, supra* is in clear conflict with the Fifth Circuit's determination in *James.*[3] The *Geaney* standard found at 417 F. 2d 1116, 1120 provides that:

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3. It should be noted that the Fifth Circuit established a *prospective rule* in *James* which was to take effect in thirty days. Thus, the affirmance of the conviction and denial of certiorari is not relevant to the sharp conflict between the Circuits as it *now* exists.

> "The threshold question is whether trial judge could conclude, after all the evidence is in, that the prosecution had established the declarant's and the defendant's participation in the conspiracy by a fair preponderance of the evidence independent of hearsay utterances."

Other circuits apparently have varying interpretation of what standard of proof is required (See *James, supra,* at 581 n. 4). None, however, demands what Petitioner contends is the correct criteria—that is the *Nixon* standard as followed by the Fifth Circuit in *James.* Additionally, the order of and presentation of proof is diametrically different (*James* at 581-2).

It is urged that this Court grant the instant Petition so that a uniform standard for admissibility of co-conspirators statements be finally and firmly established for all of the Federal Courts. The obvious confusion among the Circuits warrants such ruling by this Court for the decided cases are many and clarification is urgently needed. In any event, the *Geaney* rule as followed by the Second Circuit, in this case, is in need of revision. Since it is obvious that the Court below clings to an outmoded concept, it is respectfully suggested that this Court accept CLARK'S cause by a grant of certiorari in order to require the Second Circuit to follow the Rule established in *Nixon, supra,* and correctly interpreted by the Fifth Circuit in *James, supra.*

Since no case on *exact point (new trial on substantive count after acquittal of conspiracy)* was cited by either the District or Circuit Courts in support of the introduction of the co-conspirator statements, the teaching of *Nixon, supra,* must be followed and the acquittal in Trial I be given the effect it deserves. "Substantial, independent evidence of the conspiracy" is clearly not available of proof where the very conspiracy has been found wanting in a prior trial! Without doubt, the *conspiracy* issue should not have been taken to Jury II since Jury I found it did not exist.

Once a severance was granted by the trial Court and petitioner (and ROMANDI given a separate trial, the posture of the conspiracy evidence dramatically changed. It should never have been introduced on the second trial.

A jury verdict of guilty on a substantive count while acquitting defendant of conspiracy warranted a new trial. *United States v. Lucido,* 486 F. 2d 868, (6 Cir. 1973). This was a single trial case and unlike cases to the contrary cited by the Court below, the Sixth Circuit decreed the unfairness and prejudice that resulted from the introduction of the co-conspirators statements when conspiracy was not found by the jury. As was said in *Lucido, supra* 870:

> [3] Since the jury has found that the conspiracy was not established, the government's admissible evidence on the substantive charge is vastly reduced. The purpose of rules of evidence is to preserve procedural fairness for all parties to a proceeding. To permit hearsay evidence to support a substantive charge on the theory of the "conspiracy" exception where the charge of a conspiracy has been specifically rejected by the jury would not only undercut the very foundation of the exception, but would magnify the dangers to the liberty of the individual and the integrity of the judicial process which gave Mr. Justice Jackson so much concern in the conspiracy cases. The hearsay was admitted below only because of the conspiracy charge which was not established. Therefore, the defendant is entitled to a new trial on the substantive charge. United States v. Johnson, 334 F. supp. 982 (1971), aff'd 462 F. 2d 608 (8th Cir. 1972).

It follows that proof of conspiracy together with its hearsay should be barred in the retrial.

Clearly, petitioner has a much stronger argument in his favor. The District Court granted a separate trial to CLARK to avoid prejudicial evidence which may have been heard by the jury in a retrial of all unconvicted defendants. This separate trial should have been the ap-

propriate vehicle to disallow the statements of co-conspirators. A *de novo* proceeding warranted a trial based solely on direct or circumstantial evidence. Nothing else could satisfy Constitutional requirements.

In any event, reliance by the Circuit Court on *United States v. Kohne,* 358 F. Supp. 1053 (W.D. Pa. 1973) affirmed 485 F. 2d 678, 682, 487 F. 2d 1394, 1395, cert. denied 417 U.S. 918 and *United States v. Stanchich, supra,* are inapposite for those cases dealt with acquittal and/or dismissal of conspiracy in the same trial where the jury found defendants guilty of the underlying substantive crime. Insofar as *Kohne* and *Stanchich* are concerned, it is obvious that the better and fairer rule is found in *Lucido, supra.*

While the *Lucido* Court correctly emphasizes the necessity to "preserve procedural fairness for all parties to a proceeding," this appeal is based on even stronger grounds than cited by the Sixth Circuit in that important case. In reality, we are not concerned with the use of a co-conspirators statement where a Judge or jury has acted in the same case and found that a conspiracy did not exist, but, at bar, there was a completely different situation. Where a prior jury in a prior trial determined that no conspiracy existed, "the dangers to the liberty of the individual and the integrity of the judicial process" are magnified.

A separate trial (as here) removes the *Kohne-Stanchich* doctrine from consideration for a different jury is involved—not the same one. Obviously, the Circuit Court did not recognize this all important distinction and citation to *Kohne* by that panel is clear evidence of incorrect analysis.

Not only does the substantial independent evidence test (*Nixon, supra*) interdict the erroneous introduction of the co-conspirators statements, but a leading commentator has proposed that the trial Judge find proof of con-

spiracy "beyond a reasonable doubt" before admitting the objected to statements. Judge Jack Weinstein in *"Weinstein's Evidence"* states that:

> It is the contention of this treatise that the fair and practicable method of providing protection to the defendant without violating the letter or spirit of the Rules lies in insisting on a stringent standard of proof before the court admits a coconspirator's statement in a criminal case. Only if the court is itself convinced to a high degree of probability[15]—considering hearsay as well as nonhearsay evidence—of the conspiracy, defendant's membership, and that the statement was made during the course of, and in furtherance thereof, should it admit. This is the confession rule. See ¶ 104[07], *infra.* We would prefer a standard as high as beyond a reasonable doubt, though a "clear, unequivocal and convincing" standard or the equivalent would be suitable so long as the court was aware of the need to protect against abuse of coconspirator's declarations.[16] As the discussion below indicates, most courts apply a considerably less rigorous, often unarticulated standard, and depend on other devices, of dubious efficacy and validity under Rule 104, to protect the defendant.

1 Weinstein and Berger, *Weinstein's Evidence,* Par. 104(05) at 104-42 (1979); See also Bergman, *The Co-Conspirator's Exception; Defining the Standard of the Independent Evidence Test Under the New Rules of Evidence,* 5 Hofstra Law Review 99, 106, 110 (1975).

This suggested "reasonable doubt" standard makes a good deal of legal and logical sense, and would certainly remove the statements under attack from being allowed into evidence in the second trial. Surely, after an acquittal for conspiracy, it will be difficult for the Government to offer the statements into evidence. Collateral estoppel as developed and defined by this Court in *Ashe v. Swenson,* 397 U.S. 436, and its progeny, would certainly foreclose the issue in petitioner's favor.

That these statements, to which objection has been continuously made—from pre-trial motions to and including the instant petition—were damaging to CLARK, is beyond question. The PRAETORIUS statements (coupled with those of DIANN PRAETORIUS) had a great influence on the jury and their use can hardly be minimized. On the contrary, this Court must take note that statements concerning arrangements, payments of money and delivery of contraband (43, 69, 71, 76, 106) were heard by the jury although the alleged makers of these declarations never testified. Simply put, the damage to petitioner was overwhelming! If there was direct evidence of certain involvements, then a fair trial would allow that evidence and nothing else. *Previously rejected evidence should play no part in a retrial.*

This case was, to say the least, "a close one." When a jury deliberates for almost the same amount of time that it took to hear the actual trial testimony, the co-conspirator statements assumed even greater significance. A hesitant jury (and the record below is clear as to their uncertainty) could well move to conviction when it focused on the totality of the direct evidence together with the objected to statements of co-conspirators. For here it is not just one or two statements that infected the record, but a good deal more. Due process requires that this petitioner receive a new trial based upon an absence of evidence found to be lacking by a prior jury. Any other result makes a shambles of the conspiracy acquittal.

Rule 801(d)(2)(E) FRE provides that a statement of a co-conspirator is not hearsay if it is made:

(1) during the course of and

(2) in furtherance

(3) of a conspiracy

(4) of which declarant and defendant are members.

The glue upon which the Rule is based is "conspiracy." For any or all of the reasons advanced by

petitioner, the conspiracy acquittal must be given meaning. In the posture of this case this petition for certiorari should be granted in order that CLARK'S rights be fully protected. It has been difficult to find an exact case on direct point. *Lucido, supra* spells out the basis of petitioner's supplication. If a new trial could be granted in that case, surely a new trial should be the remedy herein. Unfortunately, petitioner's Fifth Amendment rights were violated and a fair trial denied. The relief sought of this Court to have his case heard by this final tribunal is more than warranted in the circumstances and the petition, therefore, should be granted.

II

THE ACQUITTAL OF CONSPIRACY IN TRIAL I BARRED THE RETRIAL OF PETITIONER ON IMPORTATION CHARGES IN TRIAL II ON GROUNDS OF COLLATERAL ESTOPPEL AS INCORPORATED IN THE FIFTH AMENDMENT'S PROHIBITION AGAINST DOUBLE JEOPARDY.

Petitioner contends that the second trial should have been barred, *ab initio,* on grounds of collateral estoppel. It is submitted that a review of the first trial demonstrates beyond question that the fact finder acquitted him and resolved, in his favor, the very issues that were litigated in the second trial.

The doctrine of collateral estoppel has been defined and expanded upon by this Court on many occasions. *Sealfon v. United States,* 322 U.S. 575 (1948) and *Ashe v. Swenson,* 397 U.S. 436 (1970) are but two of the landmark cases in this area. Their teaching is clear but, all too often, the lower Courts fail to correctly analyze the issue before them.

In *Ashe,* which firmly established that collateral estoppel is embodied in the Fifth Amendment prohibition against double jeopardy, MR. JUSTICE STEWART stated at 397 U.S. 436, 443-4, as follows:

> "Collateral estoppel" is an awkward phrase, but it stands for an extremely important principle in our adversary system of justice. It means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit . . . collateral estoppel in criminal cases is not to be applied with the hypertechnical and archiac approach of a 19th century pleading book, but with realism and rationality. Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires a court to "examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." The inquiry "must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings." (Citations and margin references omitted).

Notwithstanding this clear and cogent guide, collateral estoppel was, as applied to the facts of this case, misinterpreted by the Circuit Court. Although the conspiracy count in the indictment (at Trial I) spoke in terms of both conspiracy to import and to distribute, it was decided (erroneously) that CLARK'S acquittal for conspiracy failed to determine the issue of whether he was, in fact, innocent of actual importation.

While mindful of its obligations mandated by *Ashe v. Swenson, supra,* to ascertain how the judgment of acquittal affected the issues in the second trial, the Circuit Court made an obviously incorrect analysis of the trial record.

A finding that petitioner was not a member of the conspiracy, of necessity, meant that Jury I, by its deadlock, actually decided that the determination was, indeed, based on failure of proof of importation. Analysis

of the Circuit Court's slip opinion at pages 5783 to 5785[4] demonstrates that there was no basis, as a matter of law, to conclude that the first jury "could have rationally acquitted the Appellants of conspiracy without deciding they were innocent of importing heroin into the United States" (5784).

On the contrary, the jury could well have grounded its verdict of acquittal on grounds of failure to import and the *quantum leap* made in the Court's analysis to find the opposite conclusion is unjustified on the records of both Trial I and Trial II. The conclusion found at 5784 (Slip-op.) that the "fact remains that the verdicts returned by the first jury were indecisive on all aspects of the question of importation" is clearly a misreading of the trial record. For, if anything is certain, the evidence at Trial I pointed to a conspiracy to *import* by CHARLES PRAETORIUS, DIANN PRAETORIUS and LOUIS JUAN. There is simply no justification for a finding that the "object of the conspiracy was the unlawful distribution of "heroin". (Indeed, at Slip op., pages 5770 and 5771, the Court recited that there was direct testimony of a "pick-up" from JUAN at his Long Island home). No proof was ever elicited that the conviction of PRAETORIUS (in Trial I) for distribution, under Count 5, concerned itself with JUAN or DIANN PRAETORIUS.[5] The record does not support this analysis.

It simply does not follow that the conviction of CHARLES PRAETORIUS for the substantive offense of

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4. The opinion of the Circuit Court is fully printed in the appendix which is part of this petition. References are to pages in the slip opinion.

5. The error of the Court below in stating that the distribution offense took place on July 15, 1977 (Slip op. 5784) demonstrates the incorrectness of their analysis. Count 5 established the date "as on or about the 15th day of June 1977." Defendant JUAN did not become involved in the conspiracy until July 1977.

distribution "speaks to the point that the object of the conspiracy was unlawful distribution." JUAN'S later involvement and subsequent conviction for conspiracy completely negates this conclusion and dramatically points to the error in the Circuit Court's determination.

It is respectfully suggested that a distribution by CHARLES PRAETORIUS, in June 1977, cannot be "bootstrapped" into the involvement with his wife, DIANN, and JUAN in July 1977, so as to form the basis for the conclusion that the conspiracy between the three of them had distribution as its goal. Not only was proof lacking as to the source of the June 1977 heroin distribution, but more importantly, it is difficult to understand how JUAN'S (and DIANN'S) conviction for conspiracy can be set backwards in time so as to hypothesize that importation was not the basis of the illicit agreement. Concise and logical analysis precludes this result.

Indeed, there was a concession by the Court below that the circumstantial evidence of importation was strong (Slip Op. 5784). *A fortiorari,* no connection could have existed between the heroin distributed by PRAETORIUS in June 1977 and the conspiracy joined by JUAN in July 1977.

From whatever view of the evidence in the first trial, it is apparent that importation and not distribution was the basis of petitioner's conspiracy acquittal. Collateral estoppel precluded the retrial of petitioner on the substantive charges of importation.

The Second Circuit in a recent decision applied collateral estoppel to invalidate a conviction for conspiracy to distribute cocaine (21 U.S.C. Sec. 846) after a prior jury acquitted the defendant of possession of cocaine with intent to distribute in violation of 21 U.S.C. Secs. 812, 841(a)(1); (b)(1)(A), *United States v. Mespoulede,* 597 F. 2d 329 (2d Cir. 1979).

It is difficult to reconcile that decision with the instant case. Moreover, citation by the *Mespoulede* Court to *Wingate v. Wainwright,* 464 F. 2d 209 (5th Cir., 1972) is instructive and should hae been controlling on CLARK'S case. As we said at 597 F. 2d 329, 334-5:

> "The Fifth Circuit's analysis of the admissability, as similar acts of proof, of evidence of another crime of which the defendant was acquitted, is strikingly similar to our reasoning here. In *Wingate v. Wainwright,* 464 F.2d 209 (5th Cir. 1972), the court ruled that where the defendant was previously acquitted of two robberies, the Government could not reintroduce testimony that he committed those two robberies for the purpose of establishing intent or a common scheme or plan in a third trial. The Court held that it was irrelevant that the relitigated issue was an "evidentiary" fact rather than an "ultimate" fact in the new trial. As in the case before us, the relitigated facts were offered into evidence to prove that the defendant committed a different offense, but failure to prove the prior criminal acts beyond a reasonable doubt would not preclude a conviction. The essential point is that the defendant must defend against charges or factual allegations that he overcame in the earlier trial, id. at 213-14, just as if that trial had never taken place . . .

Acquittal of a prior robbery in *Wingate* and acquittal of conspiracy (CLARK) places the Government in the position of being foreclosed, in both cases, from reusing the particular evidence. Collateral estoppel precludes its use and CLARK should have been treated no differently than *Mespoulede* or *Wingate.* The jury in Trial I acquitted CLARK of conspiracy and contrary to the finding of the Court below, the jury did, in fact, resolve the issue of importation, in his favor, and this very same issue was improperly and unconstitutionally re-litigated in the second trial.

III

THE SUPPLEMENTAL CHARGE OF THE DISTRICT COURT ON AIDING AND ABETTING, BY GIVING SPECIFIC EXAMPLES FROM THE TRIAL TESTIMONY, ALTHOUGH THE EVIDENCE WAS NOT MARSHALLED IN THE MAIN CHARGE, WAS SO PREJUDICIAL AS TO VIOLATE PETITIONER'S RIGHT TO A FAIR TRIAL.

Clark's second trial was of comparatively short duration. The record will indicate the following:

January 29, 1979	A.M. Motions and jury selection
	P.M. Opening and testimony
January 30, 1979	A.M. Testimony
	P.M. Testimony
January 31, 1979	A.M. Case concluded
February 1, 1979	A.M. Summations—charge
	P.M. Jury deliberation
February 2, 1979	A.M. Jury deliberation
	P.M. Jury deliberation
	5 P.M. Verdict

The time table enumerated above is of critical importance when analysis is made of the final request by the jury for supplemental instructions. During the day and one half of deliberations (almost as much time as the testimony in the case) the panel came back on several occasions for either re-reading of testimony or instructions on the law. After approximately one hour of deliberations on February 1, 1979 they returned for instructions on aiding and abetting which was essentially a repeat of the initial charge by the Court. The next day they asked for a re-reading of testimony and a re-reading of the entire charge

of the court. In the afternoon of February 2nd, they requested a read-back of testimony and then, at approximately 4:10 to 4:15 P.M., heard the supplemental charge. It is this charge which is claimed to be so prejudicial as to require a new trial.

Obviously, the jury was having a great deal of difficulty in reaching a verdict and it can be postured that one of their chief concerns was the failure of proof of importation, of possession or evidence of any *actual* heroin in the case. A fair reading of their requests will buttress this analysis.

As set forth above, on February 2, 1979 at approximately 4:00 P.M. a note was sent from the jury to the court as follows:

> "If a person went somewhere with the intention of participating—is that aiding and abetting? Can we have aiding and abetting expanded upon" (743).

Prior to recalling the jury the court discussed this note with counsel and, after strong objection, charged the jury at 743-747. The instructions particularly objected to and found at 746-747 follows:

> "Now, what you have to do is apply those instructions to the facts of this case. That means, for example, that if you find beyond a reasonable doubt that a defendant flattened out any of the plastic bags into which the heroin was packaged, or that he broke up the vials in which the heroin was packaged for the purpose of disposing of them, or handed the scissors or the plastic bags to others during the packaging process, or he undressed himself and permitted himself to be taped in the presence of others, thereafter in the presence of others departing the hotel room taped with the heroin. Those acts—and I'm just giving you those examples. If you found them beyond a reasonable doubt to have been performed, would be aiding and abetting. But remember now what I told you that they would have to be

done with the requisite intention and knowledge and wilfullness as I have charged it to you.

All right, I hope that will be helpful to you. Will you go and continue your deliberations please?"

Analysis of the Court's main charge and prior supplemental charges will reveal that *facts* were never given in support of legal principles. Evidence was never marshalled until the above supplemental charge. The fact picture was only given in response to the last jury request and no question exists, but that this supplemental charge far exceeded the intent of the panel's question.

Of interest to the question being raised herein is the fact that the prosecutor initially told the Judge what he thought the answer to the note should be. (734)

"Mr. Summers: Judge, I think that you ought to tell the jury that the defendant does have to have the intent to participate but that that alone is not enough that it requires—aiding and abetting requires some affirmative act intended to further the venture or make the commission of the crime possible although it doesn't require that the defendant commit every act necessary to the completion of the crime."

Counsel for CLARK suggested that the Court charge the jury in the exact language of *United States v. Peoni,* 100 F. 2d 401, 402, (2d Cir., 1938) but the Court refused and stated:

"THE COURT: Well, you can't just leave them with some generalities here. We have to give them some more help and expand on it. It doesn't make any sense to read learned (sic) Hand to them. They heard that. We have to bring it down to this case in some fashion so that they have some help in this case." (738)

With all respect to the District Judge and the Circuit Court the time honored definition by Judge Hand in *Peoni, supra,* would have been sufficient to answer the jury's question. This articulation of "aiding and abetting" states:

> "In order to aid and abet another to commit a crime it is necessary that a defendant 'in some sort associate himself with the venture, that he participate in it as something that he wishes to bring about, that he seek by his action to make it succeed'." L. Hand, J. in *United States v. Peoni,* 2d Cir.] 100 F.2d 401, 402.

Objection was taken to the Court's charging of the facts. These are reflected at 736 and 742. Counsel for Petitioner respectfully told the District Court that the charge as promulgated would charge his "client into a guilty verdict."[6] The failure to marshall any evidence prior to the supplemental charge *highlighted* the facts as set forth by the Court. Moreover, it was urged upon the Court, that, by virtue of the fact that some of the examples being given by the Court were contradicted by certain testimony, enormous prejudice would be caused to CLARK.

No question exists that in the disputed charge (747) the Court told the jury, *inter alia,* that if you find that a defendant *"handed the scissors",* that would be "aiding and abetting."

Pollitt's trial testimony, which is the genesis of this purported fact, clearly demonstrates that it was he, Pollitt, who handed a scissors and not "a defendant" (274-275).

CLARK'S counsel strenuously pointed out to the Court this factual error but, nevertheless, attribution of the scissors was still placed in the hands of "a defendant" in the charge. It was urged as follows, on behalf of CLARK: (742)

> "Mr. Stave: Your Honor has scrupulously avoided marshalling the evidence in this case which I think is correct.

6. Unfortunately this prophecy was soon fulfilled when the jury returned within less than one-half hour with a guilty verdict.

I would submit that by now giving the jurors specific examples from the bench, will in effect prejudice my client because up to this point, sir, you have not given any examples of anything. And the problem we're facing by using examples is that there is contradictory testimony on some of these issues."

THE COURT: Well, of course there is. All right, I have your point in mind."

Without question, each of the examples in the supplemental charge, bore great weight with the jury. A clearly questionable "fact" at such a late hour in the deliberations of the jury may well have tipped the scales against CLARK for the Judge told the jury that no one but a defendant "handed" the scissors. An inaccuracy of this dimension cannot be minimized! That the jury was undoubtedly swayed by this charge is most evident. This instruction was patently unfair to CLARK and forms the grounds for reversal.

It is respectfully submitted that the power of the trial judge to comment on the evidence and witnesses in his instructions to the jury is not without limitations. As this Court declared in *Quercia v. United States,* 289 U.S. 466, 470

"His discretion is not arbitrary and uncontrolled, but judicial, to be exercised in conformity with the standard governing the judicial office. In commenting on the evidence he may not assume the role of a witness. He may analyze and dissect the evidence, *but he may not distort it or add to it."* (Underlining ours)

Since all of these acts took place in Bangkok it apparently conveyed to the jury the strong feeling of the Trial Court that they should render a guilty verdict if they believed the witnesses. Obviously, when the history of this case is analyzed in Trial I and Trial II, the failure to prove

actual importation of heroin in the United States was a major roadblock to an intelligent jury's decision. In Trial I the jury could not determine the guilt of any of the original 13 defendants on the substantive charge of importation. Moreover, they failed to find CHARLES PRAETORIUS guilty under the so-called 848 count (21 U.S.C. 848) and it is submitted that the failure of the Government to actually prove importation of heroin into the United States caused this problem. Accordingly, when aim is taken at the supplemental instruction it is rather clear that until the Judge charged the jury at 4:10 P.M. they were struggling with the same problem that caused the hung jury on the substantive count at Trial I. Only after the court below, in effect, told the panel what aiding and abetting was, on an incorrect factual basis, did a verdict ensue and *it was a very quick* verdict.

It is the Petitioner's contention that the Court failed to safeguard his legal rights when it gave the charge to which strenuous objection was made. *If there was failure of proof of importation, as the record makes abundantly clear, it is difficult to conceive how one can aid and abet a crime which had not been proved.*

Whether one looks at the failure of proof of importation and the concomitant failure to aid and abet on the one hand, or the invitation by the Court to the jury to find guilt on the other, CLARK'S conviction should not be allowed to stand. *Peoni, supra,* is still very good law. The District Court should have charged the jury in its terms as defined by JUDGE HAND and *not* moved so far on the supplemental charge to give the jury the "hook" upon which to place a verdict of guilty. *Quercia v. United States, supra.*

It is difficult to understand how the Court below approved the summary of the evidence, about which complaint is made, in light of the Second Circuit's prior decision in *United States v. Wiener,* 534 F. 2d 15, 19 (2d Cir.

1976). It was concisely and clearly stated that in relatively simple, short cases (such as the one at bar): "the trial Judges in this Circuit should carefully consider the preliminary question whether any further summary of the evidence is needed in the charge in a case of this sort". The District Court overstepped its bounds in the supplemental charge complained of and this action contravenes both Second Circuit doctrine and the teachings of this Court.

Surely, CLARK was denied a fair trial in the circumstances. (Fifth Amendment, United States Constitution).

IV

THE SUMMATION OF THE PROSECUTOR WAS SO PREJUDICIAL BECAUSE OF IMPROPER SUGGESTIONS, INSINUATIONS AND ASSERTIONS OF PERSONAL KNOWLEDGE AS TO CONSTITUTE PROSECUTORIAL MISCONDUCT MANDATING REVERSAL.

This case presents one more illustration of an improper summation by a prosecutor!

No question exists but that this trial presented a close question for the jury and the fact that they deliberated for one and a half days after only two days of testimony confirms this hypothesis. A reading of the Government's summation and rebuttal clearly points to improper argument which, by itself, warrants reversal.

The parameters of proper summation by a prosecuting attorney are especially well set out in *Berger v. United States,* 295 U.S. 78. (1935) This Court has time and again decreed that a governmental attorney has to meet a high standard to see that "justice shall be done". But, since the prosecutor is the representative of the sovereign,

his burden in pleading his case to the jury is one that requires vigor, but not foul play. As was so eloquently stated in *Berger* at 88, 89

> ". . . it is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one . . . Moreover, we have not here a case where the misconduct of the prosecuting attorney was slight or confined to a single instance, but one where such misconduct was pronounced and persistent, with a probable cumulative effect upon the jury which cannot be disregarded as inconsequential. A new trial must be awarded."

Reference is made to the trial records at pages 576, 580, 586-87, 589-90 and 659, 660. The prosecutor in summation, inter alia, stated as follows:

> "And again, ladies and gentlemen, you can look at this record until you are blue in the face, and I invite you to do so, and you will not find one shred of evidence as to why Ralph Abruzzo or Glenston Laws or Kenneth Pollitt would point the finger at Kenneth Clark and say, that man is a heroin smuggler, *if it wasn't true.*"
>
> ***
>
> "You can look at that record. And again I invite you to do it. Look for the motive. Look for the reason that Kenneth Pollitt and Ralph Abruzzo would get on that stand and intentionally commit perjury, intentionally lie to you in order to implicate Eric Romandi in a heroin smuggling ring. *If it were not true.*" (575-576).
>
> Could Pollitt have possibly had any of that information *unless it was true?*" (580)
>
> . . . Mr. Summers: Did it show that Pollitt was lying or *telling the truth?*
>
> You didn't hear Mr. Stave ask Mr. Pollitt or Mr. Abruzzo about what Ken Clark was doing in Bangkok, Thailand.
>
> Mr. State: I object.

Mr. Summers: In July and September, '77.

Mr. Stave: May I approach the bench?

The Court: No.

Mr. Stave: I move for a mistrial based on summation of the prosecutor.

The Court: Denied. (586-7)

***

. . . Mr. Stave: Your Honor, at one point—initially, I made an objection and your Honor denied it on the record when Mr. Summers said somewhere in mid point of the summation about scouring the record and looking at testimony, and his inference was that my defendant had to take the stand and tell a story. And I submit that is in violation of his oath as a prosecutor and is in violation of the law. He has no right to infer to a jury that anyone has to take the stand in his own defense.

The Court: I didn't draw that inference at all.

Mr. Stave: If I have the reporter read it back—

The Court: Denied. That is not a fair inference.

Mr. Stave: I would submit well, I think the record will reveal that. And I make that objection.

The Court: I know you do. I will tell you I don't.

Mr. Stave: Number two, continuously Mr. Summers mentioned, if this was not true, if that was not true, and I submit to you he was implying his own credibility before the jury which is in violation of the prosecutor's role. And I move for a mistrial based on the summation.

The Court: Denied.

Mr. Stave: Thank you. (589-590)

***

In short, ladies and gentlemen, I submit to you that all these arguments are smoke screens. And I suggested to you before, if you look at the evidence in the case, at the evidence that came from that witness stand—and I submit to you, ladies and gentlemen, that *that evidence is credible. It is believable. It is supported by the known facts in the case.* (659—Rebuttal)

***

Mr. Stave: Your Honor, at the very end of Mr. Summers' rebuttal he said—I believe the language—I submit the evidence is believable and I think it's credible.

I respectfully move for a mistrial and the withdrawal of a juror on the grounds that Mr. Summers has now placed his own credibility before the jury by making the statement. (660-Rebuttal)

***

It is obvious from a recitation of the above extracts from summation and rebuttal that the prosecutor overstepped the bounds of propriety and invoked his own credibility by standing behind the veracity of the witnesses. Not only did he constantly state that the Government's witnesses were telling the truth, but at the most crucial point, the rebuttal summation, he said *"the evidence is credible. It is believable."*

"Improper suggestions, insinuations and, especially, assertions of personal knowledge" have been condemned by this Court and the Circuit Courts on too many occasions to belabor the point. *Berger, supra; United States v. Burse,* 531 F. 2d, 1151, 1154-55 (2d Cir., 1976); *United States v. Drummond,* 481 F. 2d 62 (2d Cir., 1973).

Time and again summations which imply the association of a witness with the Government, as a guarantee of that person's credibility and, the expression of the prosecutor's personal opinion that the testimony of the witness was to be believed, have been the basis for reversal. The summation, at bar, falls within the proscription of *Berger* and *Drummond, supra.* (See 481 F.2d 62, 63 n2). Expressions such as *"if it was not true", "unless it was true," "it is believable"* and *"the evidence is credible"* fail to pass muster and have been condemned. Reversible error is the end result of this summation.

Additionally, and of the utmost consequence, was the Government's further statement that "the evidence was supported by the *"known"* facts in the case" (659). The use of the word "known" may very well have conveyed to the jury that there were facts unknown which the Government knew about and implied that there were additional reasons for knowing that they were true. An inference of outside knowledge is absolutely impermissible and improper. (See *United States v. Gradsky,* 373 F.2d 706, (5th Cir., 1967); *United States v. Lamerson,* 457 F.2d 371, (5th Cir., 1972).

Not only has this been condemned in other circuits, but *Burse, supra,* also challenged insidious remarks such as "know" or "known". Obviously, as the Court said (531 F.2d 1151, 1155), it leaves "the impression that the Government had within its possession evidence of *Burse's* guilt which had never been given to the jury." The *Burse* court placed reliance on *Berger*, and explained at 1155:

> "Perhaps if the case against Burse had been stronger, these improper comments would be of less significance. However, in an admittedly close case such as this, prosecutorial misstatements take on greater importance, whether those statements are intentional or not. The observations of the Supreme Court in the Berger case, supra, seem particularly appropriate here:
>
> 'The court below said that the case against Berger was not strong; and from a careful examination of the record we agree. Indeed, the case against Berger, who was convicted only of conspiracy and not of any substantive offense as were the other defendants, we think may properly be characterized as weak-depending, as it did, upon the testimony of Katz, an accomplice with a long criminal record.

APPENDIX "A"

DECISION

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-eighty day of December, one thousand nine hundred and seventy-nine.

Present:

HON. THOMAS J. MESKILL
Circuit Judge
HON. ROBERT J. KELLEHER
District Judge
HON. JAMES S. HOLDEN
District Judge

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

KEN CLARK, ERIC ROMANDI,

Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed in accordance with the opinion of this court.

A. DANIEL FUSARO,
Clerk

s/Arthur Heller
BY: Arthur Heller,
Deputy Clerk

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1227, 1302—August Term, 1978.

(Argued August 13, 1979

Decided December 28, 1979.)

Docket Nos. 79-1142, 79-1175

UNITED STATES OF AMERICA,

Appellee,

—v.—

KENNETH CLARK and ERIC ROMANDI,

Defendants-Appellants.

Before:

MESKILL, *Circuit Judge,*
KELLEHER* and HOLDEN,** *District Judges.*

Appellants were convicted after trial by jury in the Eastern District of New York, Nickerson, J., of importation of heroin in violation of 21 U.S.C. §§952(a) and 960(a)(1), after a jury in a prior trial deadlocked on the

* Of the Central District of California, sitting by designation.

** Of the District of Vermont, sitting by designation.

same counts, but acquitted the appellants of conspiracy to distribute and import narcotics in violation of 21 U.S.C. §846. Both appellants maintain on appeal that retrial and the evidence presented against them were barred on grounds of double jeopardy and collateral estoppel. The convictions are affirmed.

HOWARD D. STAVE, Forest Hills, New York, *for Defendant-Appellant Clark.*

THOMAS E. BOWSMAN, New York, New York, *for Defendant-Appellant Romandi.*

MARK A. SUMMERS, Assistant United States Attorney, Eastern District of New York, Brooklyn, New York (Edward R. Korman, United States Attorney, Mary McGowan Davis, Assistant United States Attorney, Eastern District of New York, Brooklyn, New York, of counsel), *for the United States of America.*

HOLDEN, *District Judge:*

Kenneth Clark and Eric Romandi appeal from judgments of conviction in the District Court for the Eastern District of New York, entered by Judge Eugene H. Nickerson on April 2 and April 30, 1979, respectively. The defendant Clark was found guilty of Counts Six and Eight of importing or aiding and abetting the importation of substantial amounts of heroin from Bangkok, Thailand, into the United States in July and September 1977, in violation of 21 U.S.C. §§952(a)

and 960(a)(1) and 18 U.S.C. §32. Romandi was found guilty of Count Eight for the September importation.[1]

The combined appeals present the restless question of collateral estoppel generated by the prior acquittal of both defendants on October 30, 1978, after a seven week jury trial on an earlier indictment. Count Two of that indictment charged the appellants and other defendants with conspiring to import, to possess with intent to distribute and to distribute substantial amounts of heroin during the life of the conspiracy, in violation of 21 U.S.C. §846.[2] The main thrust of the

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1 COUNT SIX

On or about the 14th day of July, 1977, within the Eastern District of New York, at John F. Kennedy International Airport, Jamaica, Queens, New York, the defendants CHARLES PRAETORIUS, LOUIS JUAN, JR., KEN CLARK, GLENSTON PAGE LAWS and others, did knowingly and intentionally import into the United States from Bangkok, Thailand, approximately two kilograms of heroin, a Schedule I narcotic drug controlled substance. (Title 21, United States Code, §§952(a) and 960(a)(1) and Title 18, United States Code, §2).

COUNT EIGHT

On or about the 27th day of September, 1977, within the Eastern District of New York, at John F. Kennedy International Airport, Jamaica, Queens, New York, the defendants CHARLES PRAETORIUS, DIANE PRAETORIUS, KEN CLARK, VINCENT AULETTA, and ERIC ROMANDI and others, did knowingly and intentionally import into the United States from Bangkok, Thailand, approximately four kilograms of heroin, a Schedule I narcotic drug controlled substance. (Title 21, United States Code, §§952(a) and 960(a)(1) and Title 18, United States Code, §2).

During the second trial Counts Six and Eight were referred to as Count One and Two respectively.

Clark was sentenced to concurrent terms of four years imprisonment, five years special parole, and a $10,000 fine. Romandi was sentenced to three and three months imprisonment and a special parole term of five years. Both defendants are free on bail pending this appeal.

2 COUNT TWO

Commencing on or about September 1, 1976, and continuing up to and including the 1st day of March, 1978, both dates being

appeals is double jeopardy. The principal focus is on the error assigned to the admission into evidence at the second trial of statements of co-conspirators who allegedly participated in the conspiracy charged in Count Two, wherein the appellants were found not guilty at the first trial. Both defendants contend this evidence should have been excluded by the doctrine of collateral estoppel.

The appellant Clark also contends that the Government's summation deprived him of a fair trial. He further claims that the court's supplemental instructions to the jury introduced prejudicial error which required reversal of his conviction.

Romandi's appeal challenges the sufficiency of the evidence to support the offense of importation. He con-

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approximate and inclusive, within the Eastern District of New York and elsewhere, the defendants CHARLES PRAETORIUS, DIANE PRAETORIUS, FREDERICK PRAETORIUS, KEN CLARK, VINCENT AULETTA, ERIC ROMANDI, LOUIS JUAN, JR., MICHAEL LANZA, GLENSTON PAGE LAWS, KENNETH LEBEL, WILLIAM BURLEY, KATHY PAIGE SARGENT, AUDREY PLUNKETT, GAIL HARRIS, BRENDA HOLLENBACK, JOSEPH SMITH, CARLOTTA RAGAN, and DORIS JACKSON and Daniel Warren, named herein as an unindicted co-conspirator, and others, did knowingly and intentionally combine, conspire, confederate, and agree to violate Sections 841(a)(1), 952(a) and 960(a)(1) of Title 21, United States Code.

1. It was part of said conspiracy that the defendants and others would knowingly and intentionally import into the United States from places outside thereof substantial quantities of heroin, a Schedule I narcotic drug controlled substance.

2. It was further a part of said conspiracy that the defendants and others would knowingly and intentionally distribute and possess with intent to distribute substantial quantities of heroin, a Schedule I narcotic drug controlled substance.

3. It was further a part of said conspiracy that the defendants and others would conceal the existence of the conspiracy and would take steps designed to prevent disclosure of their activities. (Title 21, United States Code, Sections 846 and 963).

tends that the trial court's restriction of his cross-examination of a government witness was in error. Lastly, he attacks the ruling of the district court which declared a mistrial after the jury failed to reach a verdict in the prior prosecution.

The First Trial

The appellants were first brought to trial on a ten count indictment which accused Clark and Romandi and sixteen others with participating in an extensive and far-reaching conspiracy which, according to the Government, was organized and principally directed by Charles Praetorius. This defendant was singly charged in Count One of a continuing series of violations of the federal narcotic law in violation of 21 U.S.C. §848. He was also charged in subsequent counts of substantive offenses with distribution of heroin on two separate occasions. All eighteen of the defendants were charged in Count Two with conspiracy to import, to possess with intent to distribute and to distribute large quantities of heroin during the period from September 1, 1976 through March 1, 1978. Six of the remaining counts charged various defendants with importing or aiding and abetting the import of heroin on successive dates. Count Six charged the appellant Clark and others with the importation of 2 kilograms of heroin on July 14, 1977. Count Eight charged both appellants Clark and Romandi, Charles Praetorius, his wife Diane Praetorius, and Vincent Auletta with importing and aiding and abetting the importation of 4 kilograms of heroin on September 27, 1977.

The trial of thirteen defendants, charged in the original indictment, commenced September 18, 1977, be-

fore Judge Nickerson. The Government's case in the first trial revolved around the testimony of Ralph Abruzzo and Glenston Page Laws, who were leading subordinates in Praetorius' organization and management of the narcotic enterprise.[3]

The combined testimony of Abruzzo and Laws related to a series of six journeys to Bangkok; the first on September 6, 1976, the last on December 19, 1977. The trips corresponded in time and sequence to six successive counts in the indictment. Charles Praetorius was named in all but Count Seven; Laws was named in Six, Seven and Ten. The appellant Clark was charged in Count Six, involving 2 kilograms of heroin in the offense of July 14, 1977, and in Count Eight which specified 4 kilos on September 27, 1977. The appellant Romandi was accused with Clark and three other defendants in Count Eight. Either Laws or Abruzzo was present on both trips; both traveled on the trip of July 1977.

Both Abruzzo and Laws were personally engaged with Charles Praetorius in the planning of the trips, the purchase of heroin in Bangkok and the packing of the substance for the return journeys to the United States. The general pattern and method of operation

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3 Four of the defendants, Glenston Page Laws, Kathy Paige Sargent, Brenda Hollenback, and Audrey Plunkett, had pled guilty and were cooperating government witnesses. Joseph Smith was then and remains now a fugitive. (Govt. Br. page 5 n3).

Before trial Abruzzo entered a plea of guilty to a single count which charged a violation of 21 U.S.C. §843(b). After testifying in the first and subsequent trials, he received a sentence of two years.

Laws was convicted and sentenced to nine years on an unrelated charge in Great Britain. He was later deported to the United States and testified at the various trials in the original indictment. He entered a plea and was awaiting sentence when the instant appeal was presented. (Brief of Appellant Clark, p. 19 n6).

were substantially similar as to each offense charged in the original indictment, although the persons involved as couriers changed from one expedition to another.

In addition to the testimony of Abruzzo and Laws, the Government's evidence included corroborating testimony of Audrey Plunkett concerning the first trip of September 1977, and Kenneth Pollitt[4] as to the second September and December trips in 1977. Testimony of Jacob Hunt was also received in the first trial of his continuing purchase of heroin from Charles Praetorius from November 1976 through June 1977.

Evidence, by way of airline tickets, passport entries, customs declarations and hotel registrations, was received to document the travels of all defendants and the various co-conspirators between the United States and Bangkok during the time of the conspiracy. In addition, small quantities of heroin, traced to Charles Praetorius and sold by Hunt and Pollitt to undercover agents, were received in evidence.

The case was submitted to the jury on October 19, 1978. The jury's deliberation continued until October 31, when the jury was discharged after reporting they were deadlocked. Before the jury reached that impasse, however, Louis Juan, Charles and Diane Praetorius were found guilty of the conspiracy charge in Count Two. The appellants Clark and Romandi and Doris Jackson were acquitted of this count. Charles Praetorius was also convicted of distributing heroin in June 1977, as charged in Count Five. He was acquitted of the continuing criminal enterprise offense asserted in

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4 Pollitt was prosecuted by the State of New York. He was sentenced to a lifetime period of probation by the Suffolk County Court. He testified under a grant of immunity in the federal prosecution.

Count One, the charge of violation of 21 U.S.C. §848. The jury failed to reach a verdict as to any of the defendants on any of the remaining counts.

The Second Trial

Before the commencement of the second trial on Counts Six and Eight, Clark and Romandi moved for judgment of acquittal and, in the alternative, for severance. The motions for acquittal were denied. The motions for severance were granted; the case proceeded to the trial of Clark and Romandi on the substantive offenses, separate from the co-defendants charged in Counts Six and Eight.

Count Six

As in the first trial, the Government's case again centered primarily on the testimony of the cooperating accomplices, Ralph Abruzzo and Glenston Page Laws. The testimony of these witnesses figured prominently in the second trial, but their evidence was, for the most part, confined to the July 2 and September 27, 1977 flights to Bangkok. According to Abruzzo, the chain of events which led to the charge, accusing Clark of participation in the July 1977 journey, began when he and Charles Praetorius met during June to plan the trip. Praetorius informed Abruzzo that he had made arrangements with Clark and Louis Juan to accompany them (Abruzzo and Praetorius) to Bangkok. Clark "was going for Charlie"; Juan "was going for me." According to the scheme, each courier would be paid $25,000 for separately carrying one-half kilogram of heroin.

Abruzzo obtained an airline employee pass. He later met with Praetorius, Clark and Juan at Kennedy Air-

port on July 6, 1978.[5] They were joined by Laws and informed by Praetorius that Laws would accompany them to Bangkok. All five departed on the same aircraft and arrived sometime between two and three o'clock in the morning of July 8, 1978, Bangkok time. All the members of the group proceeded to register at the Sheraton Bangkok Hotel.

Abruzzo went on to narrate that he and Praetorius occupied the same room in the Sheraton Bangkok. From this base Praetorius contacted Nui, his previously established source in Thailand, and later met him at an agreed upon time and place. At that location Abruzzo and Praetorius ordered two kilograms of heroin for the agreed price of $16,000 and paid $10,000 in advance. A few hours later Nui called Praetorius to arrange for delivery at a jewelry store near the Sheraton. In keeping with Nui's instruction, Praetorius and Abruzzo accepted delivery of the first kilo at the appointed place during the late afternoon of July 8.

Delivery of the second kilo was not accomplished until two days later. In the interval arrangements were made for the appellant Clark to obtain a suit, tailored to one and one-half inches larger than his normal measurement at the waist to accommodate the packing of a plastic belted container of heroin around the courier's midsection. Praetorius received the second kilo. On weighing the substance, it was discovered that the total amount of heroin was eight or nine ounces short of the two kilograms for which they had bar-

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5 Charles Praetorius, Ralph Abruzzo, Vincent Auletta and Kenneth Pollitt and appellant Clark were employed as co-workers by New York Airways at LaGuardia Airport. The appellant Romandi, during the same period, was in the employ of American Airlines at the same terminal.

gained. Praetorius then called Juan and Clark to his room and gave them the opportunity to depart for the United States immediately with the amounts previously delivered. Before a decision was reached, Praetorius, Abruzzo and Laws met again with Nui and received an amount sufficient to make up the shortage.

On the evening of July 11 the total substance was weighed and packaged in heavy plastic bags designed for use by airlines to transport skis. To flatten and compress the substance in these containers, Praetorius and Clark stomped on the bags and closed the containers with tape. Praetorius strapped one package of 21 ounces around Clark's body by means of stretch elastic tape. The second package, which contained the same amount of heroin, was strapped on Juan. After arranging their air travel, Clark and Juan departed from their hotel around midnight on July 12.

Abruzzo, Praetorius and Laws remained in Bangkok for two more days. The trio departed from Bangkok on July 14, 1977. Laws carried approximately one-half kilogram of heroin taped to his waist; Abruzzo transported three ounces taped to his right leg. On the return journey Praetorius and Abruzzo were "bumped" from their flight since they were traveling on airline passes. Laws continued to New York on his assigned flight; Praetorius and Abruzzo followed a day or two later.

Abruzzo testified that two days after he arrived in New York—"Charlie (Praetorius) called me at my house and told me he had just picked up a package from Kenneth Clark near LaGuardia Airport by Travellers Hotel . . . ." Praetorius invited Abruzzo to his apartment to deliver his package at that location. From there Abruzzo accompanied Praetorius and his wife

Diane to Juan's house at Shirley, Long Island. Juan delivered the package he transported which, according to Abruzzo, was in the same ski bag that was taped to him in Bangkok.

Later, toward the end of July, Praetorius paid Abruzzo $68,000 for the heroin transported by Juan. From this amount $25,000 was deducted to pay Juan. Abruzzo testified that at the time of payment, Praetorius informed him that—"Kennie Clark had already been paid."[6] Both Clark and Juan received an additional amount of $4,000 for each ounce of heroin transported in excess of the half kilogram, for a total of $41,000.

Abruzzo testified that he was present when Clark frequented LaGuardia Airport within a week after his return from Bangkok to inquire of Praetorius concerning the payment he was to receive. On one of these occasions, according to Abruzzo, Clark asked "when Charlie was going back to Bangkok again."

Kenneth Pollitt testified that he was employed by New York Airways at LaGuardia Airport during the summer of 1977. Abruzzo and Praetorius solicited his

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6 A. Before he paid me my 68,000 that he wanted to pay Kennie Clark and Louis Juan first and then pay me, and the day I started to receive my money from Charlie, he told me that Kennie Clark had already been paid.

Q. Did he tell you how much?

A. 25,000

Q. Did he tell you any additional monies were paid to him?

A. The 25,000 was for the clothes that he brought back, but Charlie paid him for an extra 4 ounces, 4,000 an ounce.

Q. What was the total?

A. 41,000.

Q. And what about Louis Juan?

A. Same amount, 41,000.

services as a courier. Pollitt testified that while he was considering involvement he gave the appellant Clark a ride home after work during the month of July. According to Pollitt, Clark informed him about his trip to Bangkok and what to expect.[7]

Count Eight

The offense charged in Count Eight included both appellants Clark and Romandi on the journey to Bangkok of September 27, 1977, and followed a similar pattern. This contingent was composed of Charles Praetorius, his wife Diane, Abruzzo, Kenneth Pollitt, Vincent Auletta and the appellants. As in the July trip, Abruzzo was a principal government witness, along with Kenneth Pollitt.

Charles Praetorius and Abruzzo started preparation for the September trip in August. During the first

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7 Q. And the conversation was in July of '77?

A. Yes.

Q. What did Mr. Clark tell you about the trip that he had been on?

A. Everything had gone smoothly, he went on Bangkok with Praetorius, Abruzzo, and a guy named Glen and another passenger agent from New York Airways, Louis Juan, and everything went smoothly. They had a great time over there and he told me about the process of leaving with the heroin taped to the body.

Q. What did he tell you about that?

A. He told me that Mr. Juan came to get him so he could take him to Charlie Praetorius' room and told him that he would have it taped on first and then Louis would have it taped on his body. After Mr. Clark had the heroin taped to him, Louis told him it was already on him. Louis had already been prepared. Mr. Clark couldn't tell it by a visual inspection and then Mr. Clark walked around to get used to having the dope on him and then they left at night and they went through a check point that they weren't expected to go through and then they cleared security and had no problems and returned to the states.

week in September they met with Clark at LaGuardia. Praetorius then informed Abruzzo that he had solicited Clark, Vincent Auletta, Eric Romandi and Pollitt to make the trip, along with Praetorius and his wife Diane. Auletta was employed by New York Airways. Pollitt was then on lay-off status with New York Airways. Romandi worked for American Airlines at the same terminal.

Abruzzo testified that a few days before the trip was scheduled, Praetorius told him that Clark was "going on the September trip for himself." He went on to explain that "Clark was going to buy a kilo of heroin and bring it back himself and Charlie Praetorius would sell it for him and pay him for it."

All of the travelers, with exception of Diane Praetorius, were airline employees. Abruzzo, Pollitt and Auletta departed from New York on September 20, 1977. They were joined by the appellant Clark during a stop-over in Tokyo. The appellant Romandi's departure was delayed by ticket complications and he did not leave until the following day. He was instructed by Abruzzo to try to check in at the Indra Regent Hotel; if unsuccessful, he should arrange to meet the others at that hotel at least once every day.

Abruzzo, Pollitt, Auletta and Clark arrived together at Bangkok on September 22, 1977. They all checked in at the Indra Regent, where Charles and Diane had previously registered. Romandi arrived at the same destination on September 24. Later on the day of the 22nd, Praetorius assembled all of the group, except Romandi, at the hotel bar and informed them that he had received delivery of two kilos of heroin from Nui and would obtain delivery of the remaining two kilos in a couple of days.

Shortly after his arrival in Bangkok, Pollitt testified that Romandi expressed apprehension to him whether they could return with the heroin without detection. Both Pollitt and Romandi served in the armed forces in Viet Nam. Pollitt tried to reassure him that "it can't be worse than having been in Nam."

Later that afternoon Charles and Diane Praetorius, with Abruzzo, operating together, proceeded to a designated location in Bangkok where they accepted delivery of the remaining kilos of heroin from Nui and paid him the balance of the purchase price. An increase in the price of $6,000, demanded by Nui and his associate, required additional funds. Abruzzo advanced $4,000 to Praetorius and Clark gave him $2,000.

The second delivery of heroin was brought to Praetorius' hotel suite. There the bulk of the substance was packed in the same manner employed in the July operation, by use of ski bags which were flattened and taped to Auletta. He departed from the hotel in Bangkok shortly before midnight. Romandi's package was prepared by Clark and Praetorius and taped to the appellant Romandi in the same fashion on the following day, September 25th.

The remaining kilos of heroin were prepared on September 26. Some of this substance was delivered in plastic vials. These containers were emptied, crushed and flushed in the toilet by Praetorius, Abruzzo, Pollitt and Clark. This done, the packages were prepared and taped to Clark and Pollitt. They departed from Bangkok on the same flight.

Abruzzo testified that before Clark and Pollitt left the hotel, he and Praetorius discussed obtaining a finder's fee from Clark "because Clark was carrying for

himself." Praetorius informed Abruzzo that he had discussed this with Clark and they agreed he would pay Abruzzo and Praetorius $10,000 each.

Clark made the flight in the tourist section; Pollitt flew first class. During stops in Tehran, Frankfurt and London, Clark and Pollitt remained on the plane until the flight arrived in New York. After they cleared customs, Clark remarked to Pollitt—"Now you are a rich man."

Charles and Diane Praetorius and Abruzzo departed from Bangkok on September 28. A day or two after their arrival in New York Praetorius informed Abruzzo, while they were at work, that he had picked up the package that Clark brought back and would shortly get Auletta's package. He instructed Abruzzo to fix a meeting place to retrieve Pollitt's package when Abruzzo was ready. Abruzzo testified this was accomplished the following day when he met with Praetorius and Pollitt to receive the delivery. Abruzzo paid Pollitt $20,500 and delivered the package to Praetorius.

According to Abruzzo's testimony, before the final accounts were settled, Clark visited with Praetorius and Abruzzo, while they worked at LaGuardia, to find out when the payments would be made. Praetorius informed Abruzzo and Clark that Auletta and Romandi would be paid first—$50,000 each; then Clark and Abruzzo would be paid. Thereafter Praetorius paid Abruzzo and Clark in cash that was delivered in installments in brown paper bags. Abruzzo received $100,000, which Praetorius left in his locker. Payments by Praetorius were completed on October 11, 1977. In December Abruzzo collected $10,000 at Clark's home as his share of the "finder's fee."

The details of the second September trip were corroborated by entries in passports, customs declarations and hotel registrations.

Neither of the appellants testified at the trial. The defense as to both centered on extensive cross-examinations of the government witnesses, principally Abruzzo, Pollitt and Laws, by attacking their character, credibility and their respective agreements to cooperate by testifying for the prosecution. Inconsistencies in their testimony before the grand jury and at the first trial were explored in depth. Clark presented one character witness. Romandi introduced evidence of his employment records with American Airlines.

Double Jeopardy Claims

By motions for acquittal presented before the second trial began and after the verdicts of guilty were returned, the appellants jointly challenged the second trial on the ground that their retrial on the substantive counts for importation was barred by their acquittal of the conspiracy charged in Count Two of the first trial. They contended in the trial court and on appeal that the same evidence presented to establish guilt of importation was introduced to show their participation in the conspiracy and that the acquittal of conspiracy foreclosed introduction of any evidence related to the conspiracy to establish the importation offenses charged against Clark in Count Six and Clark and Romandi in Count Eight.

Order of Mistrial in First Trial

The first double jeopardy claim revisits the first trial to challenge the declaration of a mistrial without con-

sulting defense counsel concerning possible alternatives. The question was implicated, but not explicitly presented in the defendants' motion to dismiss prior to the commencement of the second trial. It is presented again on appeal by the defendant Romandi.

> The trial judge's decision to declare a mistrial when he considers the jury deadlocked is . . . accorded great deference by a reviewing court.

Arizona v. Washington, 434 U.S. 497, 510 (1978).

The jury commenced its deliberations October 19, 1978. Its verdict was returned as to Charles Praetorius on October 28. Deliberations continued the following day and, after a modified *Allen* charge, the jury returned a verdict as to the defendants Diane Praetorius and Louis Juan. On October 30 the jury found the appellants Clark and Romandi not guilty of the conspiracy charged in Count Two. On the following day the jury notified the court that "it's of no use for the jury to continue further deliberations and a verdict cannot be agreed upon, since we believe the unanimity on verdicts cannot be agreed upon." A motion for mistrial was made on behalf of the defendant Auletta. Counsel for Romandi did not join, but requested an *Allen* charge and renewed his prior motion for acquittal under Fed.R.Cr.P. 29(a). The jury was then discharged without objection on the part of any of the defendants.[8]

After some twelve days of deliberation resulting in a deadlocked jury, the record reveals no basis of support

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8 If the appellant had an interest in having his guilt or innocence determined by this particular jury, he failed to make it known to the court. *See United States v. Beckerman*, 516 F.2d 905, 909 (2d Cir. 1975).

for appellant's claim of abuse of discretion. There were no reasonable alternatives to the ordering of a mistrial. Since the record itself fully supports this, the court was not required to make a finding of "manifest necessity." *Arizona v. Washington, supra,* 434 U.S. at 516; *United States v. Klein,* 582 F.2d 186, 194 (2d Cir. 1978).

Acquittal of Conspiracy and Collateral Estoppel

Both appellants join in the claim that their acquittal on the conspiracy count bars their conviction on the importation charges.

It is firmly established "that the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses." *Pinkerton v. United States,* 328 U.S. 640, 643 (1946).

> The power of Congress to separate the two and to affix to each a different penalty is well established. A conviction for the conspiracy may be had though the substantive offense was completed. And the plea of double jeopardy is no defense to a conviction for both defenses. It is only an identity of offenses which is fatal. A conspiracy is a partnership in crime. It has ingredients, as well as implications, distinct from the completion of the unlawful project. (Citations omitted).

Id. at 643, 644.

However, there are some exceptions. Collateral estoppel may constitute a defense to the second prosecution where the doctrine operates to preclude consideration of those issues which were determined at the first trial, although the defenses differ. *Sealfon v. United States,* 322 U.S. 575, 578 (1948).

It is now firmly established that the doctrine of collateral estoppel is embodied in the Fifth Amendment guarantee against double jeopardy. *Ashe v. Swenson*, 397 U.S. 436, 445 (1970). The majority opinion by Mr. Justice Stewart explains:

> "Collateral estoppel" is an awkward phrase, but it stands for an extremely important principle in our adversary system of justice. It means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.

Id. at 443.

The rule is more complicated in its application, as the Court went on to point out,—

> . . . (c)ollateral estoppel in criminal cases is not to be applied with the hypertechnical and archiac approach of a 19th century pleading book, but with realism and rationality. Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires a court to "examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." The inquiry "must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings." (Citations and margin references omitted).

Id. at 444.

This court on appeal is summoned to the substantial task of determining what the jury in the first trial decided and how that determination bears on the judgment in the second case. *United States v. Mespoulede,* 597 F.2d 329, 333 (2d Cir. 1979). In this effort the defendant carries the heavy "burden of proving that the fact-finder acquitted him because it resolved in his favor the very issue that he seeks to foreclose from consideration in the second trial." *Id., United States v. Gugliaro,* 501 F.2d 68, 70 (2d Cir. 1974). The burden is particularly onerous where the acquittal in the first trial involves the crime of conspiracy. *United States v. Tramunti,* 500 F.2d 1334, 1346-1349 (2d Cir. 1974).

At the first trial the court instructed the jury on the conspiracy count:

> Now, conspiracy is an offense separate from the commission of any offense that may have been committed pursuant to the conspiracy. That is because the formation of a conspiracy, of a partnership in criminal purposes is in and of itself pronounced a crime by the statute.
>
> The essense of the charge of conspiracy is an understanding among two or more persons that they will act together to accomplish a common objective which they know is unlawful. The elements of the crime are four.
>
> First, that there be two or more persons involved.
>
> Second, that they wilfully and knowingly conspired or agreed.
>
> Third, that they conspired to commit an act which is unlawful.

> Fourth, that one of the members of the conspiracy do an act to effect the object of the conspiracy.
>
> Each of these elements must be proved by the Government beyond a reasonable doubt. Initially, I shall tell you about the first and second elements.

Later in the instructions the court explained:

> Now, the indictment charges a single conspiracy involving each one of the defendants. You must determine if the conspiracy charged existed between two or more conspirators. If you find that such a conspiracy existed, to find a defendant guilty, you must find that he or she was a member of the conspiracy charged. If a defendant was not a member of the conspiracy charged, you may not find that defendant guilty even though he or she may have been a member of another conspiracy. But if a defendant was a member of the conspiracy charged, that defendant is guilty even though he or she was also a member of some other conspiracy.[9]

The court went on to explain that "mere association of a defendant with any one of the alleged conspirators is not sufficient to establish that defendant is a co-conspirator."

At the second trial, in submitting the substantive counts of importation charged in Counts Six and Eight, Judge Nickerson instructed the jury:

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9 This aspect of the court's instruction was in keeping with the evidence that there were several trips to Bangkok that could involve separate conspiracies. *E.g. Kotteakos v. United States*, 328 U.S. 750 (1946); *United States v. Taylor*, 562 F.2d 1345, 1351 (2d Cir.), *cert. denied* 97 S.Ct. 2958 (1977).

> There are three elements which the government must prove beyond a reasonable doubt:
>
> The first element: The defendant, or someone with whom the defendant was acting in concert, must have committed the act of importing heroin into this country on or about the date alleged.
>
> The second element: The defendant must have known that it was contrary to the law to import heroin into this country; and
>
> Three: The acts of the defendant must have been performed knowingly and willfully.

The court instructed on the aiding and abetting aspect of the importation counts.

> Mere presence at the scene of the crime even with knowledge that a crime is being committed is not sufficient to establish that a defendant aided and abetted the crime, unless you find the defendant was a participant and not merely a knowing spectator. Mere association of a defendant with anyone of the alleged participants is not sufficient to establish that the defendant is an aider or abettor. To determine whether a defendant aided and abetted the commission of a crime you must ask yourselves whether he participated in or associated himself with the venture as something he wished to bring about and whether he sought to make the venture succeed.

To prevail on their claim of collateral estoppel, the appellants must establish that the first jury could not reasonably have reached its verdict of acquittal on the

charge of conspiracy to import and distribute heroin without also deciding that the defendants were innocent of actual importation. *United States v. Jacobson*, 547 F.2d 21, 23 (2d Cir. 1976), *cert. denied* 430 U.S. 946 (1977). If the first jury could have reached its verdict without deciding the defendants' innocence or guilt of actually importing heroin

> the claim of collateral estoppel must fail, since the defendant can prevail only if the issue which he seeks to preclude from consideration was "necessarily" removed in his favor in the prior proceeding.

United States v. Seijo, 537 F.2d 694, 697 (2d Cir. 1976); *United States v. Cala*, 521 F.2d 605, 608 (2d Cir. 1975); *United States v. Tramunti, supra*, at 1346.

In pursuing the double inquiry of what the first jury decided and how the judgment of acquittal on the conspiracy count bears on the second trial for importation, we are mindful of the reality that the basis upon which the general verdict was reached usually cannot be demonstrated with certainty. *United States v. Seijo, supra*, 537 F.2d at 697; *United States v. Gugliaro*, 501 F.2d 68, 70 (2d Cir. 1974). As required by *Ashe v. Swenson, supra*, 397 U.S. at 44, we must determine whether a rational jury could have grounded its verdict of acquittal on the conspiracy count on an issue other than importation. To do this, we turn first to the results of the original trial.

An analysis of the verdicts reached in the first trial reveals some of the issues decided. The failure of the jury to agree on several counts against certain defendants enlightens us on the issues that the jury was unable to resolve. By the verdict of acquittal on Count

One, which charged Charles Praetorius alone, the jury determined that this accused was not guilty of organizing and operating a continuing criminal enterprise in violation of 21 U.S.C. §848.

The verdicts of guilty on Count Two established that there was a conspiracy and that the Praetoriuses and Louis Juan were conspirators. The verdict of guilty on Count Five, which charged only Charles Praetorius with the substantive offense of distribution of heroin on July 15, 1977, speaks to the point that the object of the conspiracy was the unlawful distribution of heroin in violation of 21 U.S.C. §841(a)(1) and 18 U.S.C. §2. The verdict of acquittal, as to the defendants Clark, Romandi and Doris Jackson, concluded that these defendants were not members of the conspiracy to distribute in violation of Section 841.

All of the remaining counts, except Count Nine, charged the defendants with the substantive offenses of importation in violation of 21 U.S.C. §952(a). The jury was unable to agree after extended deliberation on any of these counts. Despite the strength of the circumstantial evidence of importation, the jury's indecision on that issue is understandable in the light of the strenuous attacks on the government's principal witnesses, Laws, Abruzzo and Pollitt, and the extravagant plea bargains that induced their testimony. The fact remains that the verdicts returned by the first jury were indecisive on all aspects of the question of importation. It appears that the first jury could have rationally acquitted the appellants of conspiracy without deciding they were innocent of importing heroin into the United States.

We conclude that the appellants have failed to sustain their burden of establishing that their verdict of

acquittal on Count Two at the first trial necessarily resolved the substantive offenses charged in Counts Six and Eight within the teaching of *Ashe v. Swenson* and *Mespoulede, supra.* The court holds the United States was not estopped by considerations of double jeopardy from bringing the defendants to trial for unlawful importation.

Statements of Co-conspirators

Both appellants strenuously argue, as they did in the trial court, that the jury's acquittal on the conspiracy count at the first trial foreclosed the admission of the hearsay statements of Laws, Abruzzo and Pollitt at the retrial on substantive counts of importation. In admitting this evidence the trial court relied principally on *United States v. Stanchich,* 550 F.2d 1294 (2d Cir. 1977). The Court of Appeals rejected the contention in *Stanchich* and refers to the course charted in *United States v. Geaney,* 417 F.2d 1116 (2d Cir. 1969), *cert. denied sub. nom. Lynch v. United States,* 397 U.S. 1028 (1970).

> While the practicalities of a conspiracy trial may require that hearsay be admitted "subject to connection," the judge must determine, when all the evidence is in, whether in his view the prosecution has proved participation in the conspiracy, by the defendant against whom the hearsay is offered, by a fair preponderance of the evidence independent of the hearsay utterances. If it has, the utterances go to the jury for them to consider along with all the other evidence in determining whether they

> are convinced of defendant's guilt beyond a reasonable doubt.

417 F.2d at 1120.

> (T)he threshold question is whether trial judge could conclude, after all the evidence is in, that the prosecution had established the declarant's and the defendant's participation in the conspiracy by a fair preponderance of the evidence independent of hearsay utterances.

United States v. Cafaro, 455 F.2d 323, 326 (2d Cir.) *cert. denied* 406 U.S. 918 (1972).

There was ample direct and documentary evidence to sustain the trial court's ruling as to Clark's participation with Abruzzo and Laws in the July trip to Bangkok without resort to the hearsay declarations. The evidence was admissible under Federal Rules of Evidence 801(d)(2)(D) and (E).[10]

The same holds true of the trip in which both Clark and Romandi joined in September 1977. Apart from the hearsay declarations of Pollitt and Abruzzo, appellants' participation was confirmed by their several incriminating admissions and the documentary evidence presented by way of passport and hotel registrations.

The hearsay declarations were not barred by the prior verdicts of their acquittal at the first trial. In

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10 Notes of Committee on Judiciary, Senate Report 93-1277 State:

> While the rule refers to a co-conspirator, it is this committee's understanding that the rule is meant to carry forward the universally accepted doctrine that a joint venturer is considered a co-conspirator for the purposes of this rule even though no conspiracy has been charged. *United States v. Rinaldi*, 393 F.2d 97, 99 (2d Cir.) *cert. denied* 393 U.S. 913 (1968); *United States v. Spencer*, 415 F.2d 1301, 1304 (7th Cir. 1969).

Stanchich, supra, the trial court directed a verdict on the conspiracy count which charged the defendant with conspiring to commit the substantive crimes of violation of the federal laws against counterfeiting. The appellant argued that the same considerations which caused the trial court to dismiss the conspiracy count rendered the statements by co-conspirators inadmissible on the substantive counts. The opinion by Judge Friendly held the declarations were admissible and went on to explain:

> The argument overlooks the difference in the standards governing the two determinations. . . . A judge may thus consistently find that the evidence (even including admissible hearsay declarations) did not meet the higher test [guilt beyond a reasonable doubt] required for submission of a conspiracy count to a jury, although the independent evidence did meet the lower [preponderance] test required for admission of the declaration.

550 F.2d at 1299.

The fact that the defendants were acquitted on the conspiracy count does not destroy the admissibility of the declarations of co-conspirators on the substantive charge. *See United States v. Kohne,* 358 F.Supp. 1053 (W.D.Pa. 1973), *affirmed* 485 F.2d 678, 682, 487 F.2d 1394, 1395, *cert. denied* 417 U.S. 918 (where there was strong evidence of conspiracy, fact that defendants convicted of substantive gambling charge were acquitted of conspiracy did not retroactively render inadmissible hearsay declarations of co-conspirators). The evidence of statements by co-conspirators or joint venturers concerning the Bangkok trips of July and September 1977 were properly received.

The Court's Supplemental Instructions

Shortly after the jury received the case for deliberation at mid-afternoon on February 1, 1979, the jury requested the court to repeat its instructions on aiding and abetting. This was done and the jury resumed deliberations until they were excused for the day. The jury continued its deliberations on February 2 for approximately one hour when the court received a request to have certain testimony of the meeting of Pollitt and Clark at Forest Hills read back and a request for the reading of the entire instructions. This was done. After lunch the jury requested the testimony of Ralph Abruzzo and Kenneth Pollitt that related to Romandi. The jury again retired until about four o'clock, when a note was delivered to the court which inquired:

> If a person went somewhere with the intention of participation—is that aiding and abetting? Can we have aiding and abetting expanded upon.

Judge Nickerson drafted proposed supplemental instructions and submitted them to counsel. After considerable discussion and some objection to the court's reference to the evidence, the jury returned to the courtroom.

The court responded to the first question by plainly stating—"The mere going of a person somewhere with the intention of participation would not in and of itself be aiding and abetting." The instructions continued by repeating the prior charge as to the elements of the substantive charge of importation. The essential constituents of aiding and abetting, as explained earlier in the day, were reread. The trial judge concluded his further instructions by explaining:

> Now, what you have to do is apply those instructions to the facts of this case. That means, for example, that if you find beyond a reasonable doubt that a defendant flattened out any of the plastic bags into which the heroin was packaged, or that he broke up the vials in which the heroin was packaged for the purpose of disposing of them, or handed the scissors or the plastic bags to others during the packaging process, or he undressed himself and permitted himself to be taped in the presence of others, thereafter in the presence of others departing the hotel room taped with the heroin. Those acts—and I'm just giving you those examples. If you found them beyond a reasonable doubt to have been performed, would be aiding and abetting. But remember now what I told you that they would have to be done with the requisite intention and knowlege and wilfullness as I have charged it to you.
>
> All right, I hope that will be helpful to you. Will you go and continue your deliberations please?

The jury again retired and at five o'clock returned verdicts of guilty as to each defendant on both counts. The appellant Clark contends that the court's marshalling of the evidence for the first time was coercive, its effect was unfair to him, and requires reversal. We disagree.

The court responded to the jury's first inquiry with a straightforward answer. The note also inquired: "Can we have aiding and abetting expanded upon(?)." Both requests were granted within permissible bounds of the evidence; it was fair and without demonstrably coercive effect.

> In a trial by jury in a federal court, the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law. In charging the jury, the trial judge is not limited to instructions of an abstract sort. It is within his province, whenever he thinks it necessary, to assist the jury in arriving at a just conclusion by explaining and commenting upon the evidence, by drawing their attention to the parts of it which he thinks important; and he may express his opinion upon the facts, provided he makes it clear to the jury that all matters of fact are submitted to their determination. (Citations omitted).

Quercia v. United States, 389 U.S. 466, 469 (1933) (Hughes, C.J.).

It is clear from the record that the jury wanted something more than the bare recitations of the law which they had previously received on two occasions. There was no comment on the credibility of witnesses, no expression of opinion on the facts. The jury was cautioned that the explanation was given in terms of examples. The examples referred to were derived from the evidence. Of necessity, the reference was to the government's evidence for the defendants presented only evidence of good character. *See United States v. Tourine,* 428 F.2d 865, 869 (2d Cir. 1970). The supplemental instructions went no farther than the need indicated in the jury's request. *E.g. United States v. Wiener,* 534 F.2d 15 (2d Cir. 1976).

The Government's Summation

As previously indicated, the defense centered on the credibility of the government's witnesses who traveled

to Bangkok with the defendant Clark in July and with both defendants in September. The summation of defense counsel followed that line to the effect that the government's case against his client was founded on lies—"little lies, big lies, bigger lies." He argued that the prosecutor had given the jury "nothing but three people who have every motive in the world to lie, who have lied before and will lie again, who are saving their skins."

By way of response in closing argument, the Assistant United States Attorney invited the jury to examine the evidence in the case that came from the witness stand:

> And I submit to you, ladies and gentlemen, that that evidence is credible. It is believable. It is supported by the known facts in the case.

Clark's counsel moved for a mistrial on the ground that that the prosecutor "has now placed his own credibility before the jury by making that statement." He urges on appeal that the argument constitutes prosecutorial misconduct requiring reversal.

This appeal affords no occasion to belabor the firmly established principle that vigorous prosecution of a criminal offense imposes constraint against "improper suggestions, insinuations and, especially, assertions of personal knowledge." *Berger v. United States,* 295 U.S. 78, 88 (1935). *United States v. Burse,* 531 F.2d 1151, 1155 (2d Cir. 1976). And, of course, the government's attorney may not interject his own credibility nor vouch for the credibility of witnesses on facts undisclosed in the record. *United States v. Drummond,* 481 F.2d 62, 63 (2d Cir. 1973).

To review the remarks of the attorney representing the United States in the context complained of requires a strained construction not supported by the record. The prosecutor invited the jury's attention to the full evidence; he made no reference to his personal knowledge.

The controlling question is whether the remarks of the prosecutor invaded the accused's right to a fair trial. *E.g. United States v. D'Anna,* 450 F.2d 1201, 1206 (2d Cir. 1971). Instances in *Berger* and *Burse* of improper summation were aggravated by the combination of unfair cross-examination of witnesses and prejudicial conduct that infected the trial generally.

Where a substantial portion of the defense summation is devoted to attacks upon government witnesses, with stress on their cooperation, the prosecutor is entitled to make an appropriate response. *United States v. Wilner,* 523 F.2d 68, 73 (2d Cir. 1975). We find no merit to the claim that the government's closing argument deprived the appellant of a fair trial.

Proof of Importation of Heroin

The appellant Romandi advances two further points beyond those claimed by the appellant Clark. The first is that his conviction cannot stand because there was no proof that the substance imported was heroin.

Evidence of a chemical analysis of the substance is not essential to a valid conviction for a narcotic offense. Neither is it necessary that direct evidence be presented to prove the nature of the substance. *United States v. Quesada,* 512 F.2d 1043, 1045 (5th Cir. 1975) *cert. denied* 423 U.S. 946 (1975). *See United States v. Fantuzzi,* 463 F.2d 683, 689 n.7 (2d Cir. 1972).

> Just as with any other component of the crime, the existence of and dealing with narcotics may be proved by circumstantial evidence; there need be no sample placed before the jury, nor need there be testimony by qualified chemists as long as the evidence furnished ground for inferring that the material in question was narcotics.

United States v. Agueci, 310 F.2d 817, 828 (2d Cir. 1962) *cert. denied* 372 U.S. 969.

The record here yields abundant circumstantial support for the inference that the substance imported from Bangkok was heroin. It was obtained surreptitiously from a connection in Bangkok. Great effort was made to conceal it. Large amounts of cash were paid to obtain it from the source and to compensate the couriers for transporting it. The witness Pollitt, an experienced user, sampled it and attested the white powder was "high quality heroin." This claim of error is refuted by the record.

Cross-examination of Abruzzo

At the second trial, as in the first, Romandi's counsel undertook to cross-examine Ralph Abruzzo to establish that on April 25, 1978, the witness testified before the Grand Jury that Romandi had not carried heroin on the September 1977 trip from Bangkok. The transcript of Abruzzo's testimony before the Grand Jury was garbled and confusing.

The witness was first asked how much heroin "Eric DiRomandi" (sic) brought back to the United States on the trip Abruzzo made in September. Abruzzo responded: "A kilo." The next question repeated:

Q. Did Charles Praetorius, DiRomandi or yourself carry any heroin on this trip?

A. This was the July trip?

Q. This was the September trip.

A. No, they didn't.

On cross-examination of Abruzzo at the second trial:

Q. Do you recall ever being asked if you have stated to anyone if Charles Praetorius, Romandi or you carried any heroin into this country and that you answered that question "No"? Do you remember anyone asking you that?

A. If anyone asked me, myself, Charlie—

Q. No, if anyone ever asked you and—that question in that manner, do you recall that?[11]

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11 MR. SUMMERS: Could we have that question reread, please?

(Read back)

THE COURT: Why don't you try again, please?

BY MR. BOWSMAN:

Q. It would be that if you recall at the first trial if anyone ever asked you if you ever told anyone that Charlie Praetorius, Romandi or yourself ever carried any heroin back from the September 1977 trip—

MR. SUMMERS: I object to the question and ask for a side bar.

THE COURT: Yes, come to side bar, please.

(Side bar)

THE COURT: I don't understand this.

MR. SUMMERS: Your Honor, what Mr. Bowsman is getting at is cross-examination that he has with Mr. Abruzzo in September. We strenuously objected at the time and I strenuously object again on the basis of the fact there's no good faith basis for that

(footnote continued on next page)

A side bar conference followed. As appears in the margin, the colloquy failed to dispel the confusion that prevailed among counsel, the witness and the court. The question was finally excluded with the observation—"It doesn't make any sense."

The appellant Romandi urged that counsel should have been permitted to cross-examine Abruzzo about

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question to be asked at the time that it was asked and there's no good faith basis for it to be asked now.

THE COURT: What is the question? I don't even even understand the question.

MR. BOWSMAN: I haven't finished the question. I can withdraw it and reask it.

THE COURT: Would you mind telling me what the question is and keeping your voice down at the same time?

MR. BOWSMAN: I'll try to.

I am going to ask him if he was ever asked the question, did Charlie Praetorius, Romandi or yourself ever carry any heroin back from Thailand in September, 1977, and the answer to that question was "No"—

THE COURT: That he wasn't asked that?

MR. BOWSMAN: That he was asked that and the answer that he gave to that question was "No".

THE COURT: That he wasn't asked that?

MR. BOWSMAN: Which I specifically asked him in the first trial, which he answered and, in fact, if your Honor remembers, it was your Honor that asked him, "Did you say that, is that your answer?" and he said "Yes" to you.

MR. SUMMERS: That was when Mr. Abruzzo was shown the Grand Jury transcript. This is the page of the Grand Jury transcript where that question was asked. I'll call your attention to this question at the bottom of the page (indicating).

As you can see, two lines above that he's clearly answered that Eric Romandi carried a kilo. These are circles of the number of typographical errors on this page. The Court Reporter who took this correct transcript, took his testimony, is now retired, lives in California and he was contacted to get his notes, make the corrections in the page after the last trial. We haven't been able to accomplish that.

I submit to the Court there's no good faith basis based on the number of typographical errors. This is supposed to refer to Diane Praetorius, because that's the testimony and the only evi-

(footnote continued on next page)

his statements to the Grand Jury at the first trial and should have been permitted to submit the Grand Jury minutes into evidence.

We are inclined to agree that the minutes of the Grand Jury on April 25, 1978 might well have been received. Contrary to the appellants' claim, the transcript was not offered. This is understandable since the document was a double-edged sword; it showed some inconsistency, but it also confirmed that Romandi carried a kilo of heroin into the United States.

It is hardly open to question that the unexplained curtailment of cross-examination runs counter to the accused's right of confrontation. *See e.g. Smith v. Illinois*, 390 U.S. 129 (1968); *Alford v. United States*, 282 U.S. 687 (1931). But the right to cross-examination is not without limits.

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dence he gave. The question is clearly asked two lines above and the answer is a kilo. There's no consistency, no good faith basis for it.

THE COURT: Yes.

MR. BOWSMAN: If your Honor please, the inconsistency is that it's a phonetic spelling of Romandi which occurred in the last trial, as you recall. He was called "Erica Mondi" and everything else under the book except the spelling is exactly the same. If it's a typographical here, it's a typographical here.

THE COURT: It doesn't make any sense.

MR. BOWSMAN: The fact of the matter is that he is saying here Romandi—

THE COURT: He said one line above that he did.

MR. BOWSMAN: Wouldn't that be an inconsistent statement?

THE COURT: No, it makes no sense. He used the word "Eric" there (indicating).

MR. BOWSMAN: He also—would you let him ask—

THE COURT: No, I won't.

MR. STAVE: Judge, I would think the proper question was simply, "Were you asked these questions and did you give these answers to the Grand Jury," period and have him read it. It's

(footnote continued on next page)

> The extent of cross-examination with respect to an appropriate subject of inquiry is within the sound discretion of the trial court. It may exercise a reasonable judgment in determining when the subject is exhausted.

282 U.S. at 694.

The discretion vested in the trial court includes reasonable control to make the interrogation and presentation effective for the ascertainment of the truth and to avoid needless consumption of time. Federal Rules of Evidence 611(a). The restrictive ruling challenged here involved both considerations. The question excluded was confusing to court, counsel and the witness alike.

Beyond that, Abruzzo was subjected to cross-examination which is transcribed in 121 pages of the record. The questioning included his interest in testifying for the government; the benefits derived from plea bargaining and instances of claimed inconsistent prior statements in the Grand Jury proceeding and at the first trial. The witness was placed in his proper setting; the weight of his testimony and his credibility were fully tested. No prejudice is shown.

The judgment of the district court as to each defendant is affirmed.

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more than proper. I think that his right to cross-examine would be restricted.

THE COURT: It's unfair.

(In open court)

MR. SUMMERS: I ask the question be stricken.

THE COURT: Yes.

Just disregard that question, please.

APPENDIX "B"
ORDER DATED FEBRUARY 27, 1980

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-seventh day of February, one thousand nine hundred and eighty.

Present:

HON. THOMAS J. MESKILL,
Circuit Judge
HON. ROBERT J. KELLEHER
HON. JAMES S. HOLDEN,
District Judges

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

KEN CLARK, ERIC ROMANDI,

Defendant-Appellants.

A petition for a rehearing having been filed herein by counsel for the appellants, Ken Clark and Eric Romandi

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

A. Daniel Fusaro
Clerk

APPENDIX "C"
ORDER DATED 2/27/80

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CHARLES PRAETORIUS, DIANE PRAETORIUS,
KEN CLARK VINCENT AULETTA,
RALPH ABRUZZO, ERIC ROMANDI,

Defendants,

KEN CLARK, ERIC ROMANDI

Defendants-Appellants.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellants Ken Clark, Eric Romandi, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

s/Irving R. Kaufman
Chief Judge
IRVING R. KAUFMAN

Supreme Court, U. S.
FILED
MAY 30 1980
MICHAEL RODAK, JR., CLERK

No. 79-1494

In the Supreme Court of the United States

OCTOBER TERM, 1979

KENNETH CLARK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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KENNETH CLARK, PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 3a-39a) is reported at 613 F.2d 391.

JURISDICTION

The judgment of the court of appeals was entered on December 28, 1979 (Pet. App. 1a-2a). A petition for rehearing was denied on February 27, 1980 (Pet. App. 40a). The petition for a writ of certiorari was filed on March 25, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether principles of collateral estoppel barred petitioner's retrial on charges of importing or aiding and abetting the importation of heroin following his acquittal on charges of conspiracy to import heroin.

2. Whether there was sufficient evidence of a conspiracy to warrant admitting statements of a co-conspirator at petitioner's second trial.

3. Whether the district court's supplemental charge to the jury on aiding and abetting was improper.

4. Whether the summation of the prosecutor constituted prejudicial error.

STATEMENT

In September 1978, petitioner and 12 others were tried in the United States District Court for the Eastern District of New York on a ten count indictment. The indictment named petitioner, Charles Praetorius, and 16 others as participants in an extensive conspiracy to import heroin into the United States from Bangkok, Thailand, and also charged them with committing various substantive drug offenses.[1] Petitioner was charged with conspiring to import and distribute large quantities of heroin from

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[1] Praetorius was charged in Count I under 21 U.S.C. 848 with organizing and managing a continuing series of violations of the federal narcotics laws. All 18 defendants were charged in Count II with conspiracy. Six of the remaining counts charged various defendants with importing or aiding and abetting the importation of heroin into the United States.

September 1976 to March 1978, in violation of 21 U.S.C. 841(a)(1), and with two counts of importing heroin, in July and September 1977, in violation of 21 U.S.C. 952(a) and 960(a)(1) and 18 U.S.C. 2. The jury acquitted petitioner of the conspiracy count but failed to reach a verdict as to the two substantive counts (Pet. App. 7a-10a).[2] Petitioner was retried on these two counts and was convicted. He was sentenced to concurrent terms of four years' imprisonment on each count, a $10,000 fine, and a special parole term of five years (Pet. App. 5a n.1). The court of appeals affirmed (Pet. App. 3a-39a).

The government's case at the second trial, as at the first, centered around the testimony of co-conspirators Ralph Abruzzo and Glenston Page Laws, who were Charles Praetorius' leading subordinates in the organization and management of the heroin conspiracy.[3] The evidence showed that on July 6, 1977, petitioner, accompanied by Abruzzo, Praetorius, Laws, and Louis Juan departed New York

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[2] The jury convicted Charles and Diane Praetorius and Louis Juan on the conspiracy count, while acquitting Eric Romandi and Doris Jackson, as well as petitioner. In addition, the jury acquitted Charles Praetorius of the continuing criminal enterprise offense charged in Count I, but convicted him of one substantive count of distributing heroin. The jury failed to reach a verdict as to any of the defendants on any of the remaining counts (Pet. App. 9a-10a).

[3] Ralph Abruzzo was not charged in the original indictment. In connection with his cooperation agreement with the government, Abruzzo pled guilty to one count charging him with use of the telephone to facilitate the distribution of heroin, in violation of 21 U.S.C. 843(b) (Pet. App. 8a n.3).

for Bangkok, Thailand, arriving in Bangkok on July 8 (Pet. App. 8a, 11a; Tr. 44-47, 372-380).[4] Praetorius immediately contacted his Bangkok source and arranged for the purchase of two kilograms of heroin (Tr. 51-53). Praetorius and Abruzzo picked up the first kilogram that afternoon (Tr. 54-55) and, together with Laws, the second kilogram two days later (Pet. App. 11a-12a; Tr. 57, 59-61, 387-390). On July 12, petitioner and Juan departed Thailand with the heroin, which had been repackaged in ski bags and taped to their bodies (Tr. 61-66, 391-395). Praetorius, Abruzzo and Laws departed Bangkok two days later, the latter two carrying additional amounts of heroin (Pet. App. 12a). Once back in New York, Praetorius retrieved from petitioner and Juan the heroin they had carried into the United States, paying them each $41,000 for their service as couriers (*id.* at 12a-13a; Tr. 70-71, 396).

In late September 1977, petitioner again flew to Bangkok, accompanied by Abruzzo and two different co-defendants, to join Charles and Diane Praetorius (Tr. 81-84, 256-263). That same day Charles Praetorius collected two kilograms of heroin from his source; two days later Abruzzo and Diane Praetorius picked up another two kilograms (Pet. App. 15a-16a; Tr. 88-90, 91-97, 264-266). The heroin was again packed in ski bags and taped to the bodies of petitioner and other couriers, who returned with it to the United States (Pet. App. 16a; Tr. 97-104,

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[4] "Tr." refers to the transcript of petitioner's second trial.

269-280). As to this latter trip, Abruzzo testified that Praetorius had informed him that petitioner would be "going * * * for himself," meaning that petitioner was to purchase a kilogram of heroin himself, carry it back to the United States, and be paid for it by Praetorius at a rate of $4,000 per ounce (Tr. 76). Moreover, petitioner, who was paid $136,000 for his services as a courier, ultimately gave Abruzzo $10,000 as a "finder's fee" for allowing him to purchase heroin from Abruzzo's and Praetorius' "connection" in Thailand (Pet. App. 17a; Tr. 103-104, 107-111).

ARGUMENT

1. Petitioner contends (Pet. 17-21) that principles of collateral estoppel barred his retrial on the two substantive counts on which the jury was unable to reach a verdict at the first trial, because, in his view, the factual questions involved were already decided in his favor by the first jury in acquitting him of conspiracy. This contention is without merit.

We note at the outset a basic flaw in petitioner's contention. This is not the garden variety collateral estoppel claim in which a defendant, having been acquitted in a trial on one charge, seeks to bar prosecution on a different charge on the ground that a fact or facts essential to successful prosecution on the second charge had been resolved in his favor by the first acquittal. Here, the substantive importation charges were themselves litigated in the first trial, and at least some jurors were prepared to find petitioner guilty. Even if it could be said that the failure

to return a verdict on the substantive counts was inconsistent with the conspiracy acquittal, we believe no collateral estoppel effect can properly be given where the first jury heard the charges that are allegedly estopped and did not acquit. In any event, in the circumstances of this case the conspiracy acquittal does not factually support estoppel on the substantive charges.

The doctrine of collateral estoppel, as embodied in the Fifth Amendment guarantee against double jeopardy, generally precludes prosecution of an offense when an issue essential to a conviction has necessarily been determined in favor of the defendant at a previous trial. *Ashe* v. *Swenson*, 397 U.S. 436 (1970). The doctrine is applicable, however, only when the defendant can show that the jury's verdict in the prior trial necessarily decided in his favor the issue he seeks to foreclose from further litigation. *United States* v. *Mespoulede*, 597 F.2d 329, 333 (2d Cir. 1979); *United States* v. *Seijo*, 537 F.2d 694, 697 (2d Cir. 1976), cert. denied, 429 U.S. 1043 (1977). The burden of making this showing is substantial "since it usually cannot be determined with any certainty upon what basis the previous jury reached its general verdict." *United States* v. *Gugliaro*, 501 F.2d 68, 70 (2d Cir. 1974). And the difficulty of making this showing is exacerbated when, as here, the acquittal in the previous criminal case is on a conspiracy charge. *Ibid.*, citing *United States* v. *Tramunti*, 500 F.2d 1334, 1346-1349 (2d Cir. 1974).

Thus, resolution of a claim of collateral estoppel depends upon an analysis of the particular facts adduced at successive trials. These factual considerations have been resolved against petitioner by both courts below, and no issue is presented here that warrants this Court's review. Moreover, the disposition below was plainly correct. As the district court found (A. 22a-23a),[5] although the evidence at the first trial that tended to support a finding of importation could also have implied that petitioner had become part of the Praetorius conspiracy, it did not make such an inference inevitable. Given the evidence at that trial that petitioner was carrying heroin "for himself," the first jury certainly could have concluded that petitioner had brought the drugs into the United States but had not entered into an agreement with Praetorius to import and distribute heroin.

Another plausible explanation for petitioner's acquittal of conspiracy at the first trial is that the jury may have found that several different conspiracies existed and that petitioner was not a member of the single conspiracy charged in the indictment. Such a conclusion would not have been unreasonable, given the evidence at that trial that there were several trips to Bangkok involving different participants, and given the court's instructions to the jury on the issue

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[5] "A." refers to the appendix filed on appeal by petitioner and co-defendant Eric Romandi.

of multiple conspiracies.[6] See *United States* v. *Gugliaro*, *supra*, 501 F.2d at 71. In these circumstances, the court of appeals correctly found (Pet. App. 25a-27a) that a rational jury could have acquitted petitioner of the charged conspiracy without deciding that he had not engaged in importation. See *Ashe* v. *Swenson*, *supra*, 397 U.S. at 444.[7]

2. Petitioner also contends (Pet. 9-17) that statements by other participants in the importation were improperly admitted at the retrial since the first jury had acquitted him of conspiracy. This contention is without foundation.

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[6] The court instructed the jury (Pet. App. 23a):

> Now, the indictment charges a single conspiracy involving each one of the defendants. You must determine if the conspiracy charged existed between two or more conspirators. If you find that such a conspiracy existed, to find a defendant guilty, you must find that he or she was a member of the conspiracy charged. If a defendant was not a member of the conspiracy charged, you may not find that defendant guilty even though he or she may have been a member of another conspiracy. But if a defendant was a member of the conspiracy charged, that defendant is guilty even though he or she was also a member of some other conspiracy.

[7] Petitioner's reliance (Pet. 20-21) on *United States* v. *Mespoulede*, *supra*, is misplaced. That case involved nothing more than the determination, on an entirely different factual record, that the jury's acquittal of the defendant on a charge that he possessed cocaine on a specific day foreclosed the government from attempting to prove that same possession in a later conspiracy trial. *Mespoulede* did not apply any legal standard different from that followed in this case, however, and in fact served as a guide for the decision below (see Pet. App. 22a, 26a-27a).

Petitioner's acquittal of conspiracy at his first trial constituted a finding by the jury that the government had failed to prove petitioner's guilt on that charge beyond a reasonable doubt. However, to warrant the admission into evidence of statements by co-conspirators under Fed. R. Evid. 801(d)(2)(E), the government is not required to establish participation in the conspiracy beyond a reasonable doubt. The government must show that the statements were made by a joint venturer or participant in the conspiracy, but this showing may be made by a quantum of independent evidence less than that required to convict. See, *e.g.*, *United States* v. *Mangan*, 575 F.2d 32, 42-43 (2d Cir.), cert. denied, 439 U.S. 931 (1978); *United States* v. *Geaney*, 417 F.2d 1116, 1120 (2d Cir. 1969), cert. denied, 397 U.S. 1028 (1970).[8] Indeed, so-called co-conspirator statements may be admissible even if a conspiracy has not been charged. See S. Rep. No. 93-1277, 93d Cong., 2d Sess. 26-27 (1974); 4 *Weinstein's Evidence* ¶ 801(d)(2)(E)[01]

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[8] Petitioner correctly observes (Pet. 10-12) that the courts of appeals have not agreed on the formulation of the standard to be applied in determining whether the independent evidence of a defendant's participation in a conspiracy is sufficient to warrant admission of co-conspirator statements against him. See, *e.g.*, *United States* v. *James*, 590 F.2d 575, 581 & n.4 (5th Cir.) (en banc), cert. denied, 442 U.S. 917 (1979) ("substantial independent evidence"); *United States* v. *Santiago*, 582 F.2d 1128, 1133-1135 (7th Cir. 1978) ("preponderance"). But it seems likely that these variations in phrasing will seldom, if ever, produce different results. In this case, the independent proof of participation was sufficient under any of these tests, and there is no need to decide here which of the various formulations is most appropriate.

(1979). And because of the difference in standards, co-conspirator statements may be admissible even when a conspiracy count has been dismissed by the court, *United States* v. *Stanchich*, 550 F.2d 1294, 1299 (2d Cir. 1977), or when the declarant has been acquitted of conspiracy, *United States* v. *Cravero*, 545 F.2d 406, 419 (5th Cir. 1976), cert. denied, 430 U.S. 983 (1977). Whether or not there has been an acquittal, the test remains whether independent evidence establishes participation by the declarant and the defendant in a joint venture or a conspiracy.[9] The court of appeals' finding that there was sufficient evidence to meet this standard does not merit further review.[10]

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[9] *United States* v. *Lucido*, 486 F.2d 868 (6th Cir. 1973), on which petitioner relies (Pet. 13-14, 17), is not to the contrary. In *Lucido*, the government introduced co-conspirator statements against a defendant charged with conspiracy and two substantive counts. The defendant was convicted on one of the substantive counts but acquitted of conspiracy. On appeal, the court held that the use of co-conspirator declarations to establish the substantive charge against the defendant was reversible error on the facts of that case. The court stated (486 F.2d at 869):

> [The rule permitting introduction of statements by co-conspirators] is applicable only in situations where independent evidence establishes *prima facie* an illegal joint venture. * * * No such independent evidence exists in this case.

The rule stated is the same as that applied by the court below. Here, however, sufficient independent evidence of a conspiracy did exist, which warranted the admission of the co-conspirator declarations.

[10] Again, as with petitioner's more general collateral estoppel claim (see pages 7-8, *supra*), we note that the acquittal

3. Petitioner also contends (Pet. 22-28) that the district court's supplemental charge to the jury on aiding and abetting constituted reversible error. This contention is without merit.

Shortly after the jury received the case for deliberation, it requested the court to repeat its instructions on aiding and abetting (Tr. 686), and the court did so. The following day, the jury requested that certain testimony and the entire instructions be repeated (Tr. 697-698), and the court complied with the request. Shortly thereafter, the jury requested that certain other testimony be repeated (Tr. 728). Later that afternoon, the jury sent the court the following note (Pet. App. 30a):

> If a person went somewhere with the intention of participation—is that aiding and abetting? Can we have aiding and abetting expanded upon.

The court drafted supplemental instructions and, after submitting them to counsel, instructed the jury that "[t]he mere going of a person somewhere with the intention of participation would not in and of itself be aiding and abetting" (Tr. 744). The court then repeated its prior charge as to the elements of the substantive offense of importation, and reread the instructions it had given the jury earlier that day as to the elements of aiding and abetting (Tr.

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was not necessarily a finding by the first jury that petitioner had not participated in any conspiracy, but simply a finding that the government had failed to establish beyond a reasonable doubt his participation in the particular conspiracy charged.

744-746). Over objections by defense counsel, the court then expanded on its instructions by using examples of conduct derived from the testimony at trial (Tr. 746-747; Pet. App. 31a):

> Now, what you have to do is apply those instructions to the facts of this case. That means, for example, that if you find beyond a reasonable doubt that a defendant flattened out any of the plastic bags into which the heroin was packaged, or that he broke up the vials in which the heroin was packaged for the purpose of disposing of them, or handed the scissors or the plastic bags to others during the packaging process, or he undressed himself and permitted himself to be taped in the presence of others, thereafter in the presence of others departing the hotel room taped with the heroin. Those acts—and I'm just giving you those examples. If you found them beyond a reasonable doubt to have been performed, would be aiding and abetting. But remember now what I told you that they would have to be done with the requisite intention and knowledge and willfulness as I have charged it to you.
>
> All right, I hope that will be helpful to you. Will you go and continue your deliberations please?[11]

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[11] Petitioner's claim (Pet. 25-26) that the trial judge distorted the evidence by telling the jury that either petitioner or co-defendant Romandi had handed the scissors to others during the heroin packaging process is spurious. The judge merely instructed the jury that, *if* they found beyond a reasonable doubt that a defendant handed the scissors or the plastic bags to others during the packaging process, such act would constitute aiding and abetting. Moreover, the possi-

These instructions did not constitute error. In a trial by jury in federal court, the presiding judge has a responsibility to direct and assist the jury in its duty of applying the law to the facts of the case. *Quercia* v. *United States*, 289 U.S. 466, 469 (1933). In charging the jury, the judge is not limited to instructions of an abstract sort but may specifically refer to the evidence. Indeed, the judge may go well beyond what the trial court did here; he may comment on the evidence, direct the jury's attention to certain pieces of evidence, and express his opinion upon the facts, provided that he clearly informs the jury that it is the final arbiter of the facts. *Ibid.* Moreover, when a jury makes explicit its difficulties in applying the law to the facts of the case, the trial judge is under an obligation to give supplemental instructions to dispel the confusion. See *Bollenbach* v. *United States*, 326 U.S. 607, 612-613 (1946). He is not bound by standard instructions, but should supplement such instructions as necessary. See, *e.g.*, *United States* v. *Bolden*, 514 F.2d 1301, 1308-1309 (D.C. Cir. 1975).

The jury in the instant case clearly indicated that it wanted something more than the bare recitation of the law it had already heard three times. The

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bility that petitioner did handle the scissors was raised by the government's evidence. On direct examination, unindicted co-conspirator Kenneth Pollitt testified (Tr. 274-275) that during the September trip to Bangkok, "[petitioner] and myself, I don't believe we took any active role, just being present, maybe handing the plastic bag or scissors to Charlie [Praetorius]."

judge, in giving the jury examples based on the evidence, expressed no opinion on the credibility of the witnesses or other evidence. Moreover, he expressly cautioned the jury that the explanation was given in terms of examples. In these circumstances the court of appeals correctly found (Pet. App. 32a) that the instructions were proper and "went no farther than the need indicated in the jury's request."

4. Petitioner's final contention (Pet. 28-33), that the prosecutor improperly vouched for the credibility of government witnesses in his closing argument to the jury, is insubstantial. Petitioner's defense centered on the credibility of the government's witnesses. Defense counsel extensively attacked the witnesses' character, credibility, and respective agreements to cooperate with the government (Pet. App. 18a), and argued to the jury in closing argument that the government's case was based on lies—"[l]ittle lies, big lies, bigger lies" (Tr. 610).

Responding to these allegations in his closing argument, the prosecutor invited the jury to examine the evidence, stating, *inter alia* (Tr. 659):

> * * * I submit to you, ladies and gentlemen, that that evidence is credible. It is believable. It is supported by the known facts in the case.

It is well established that the prosecutor may not interject his own personal knowledge or credibility nor vouch for the credibility of witnesses on facts not disclosed in the record. See, *e.g.*, *Berger* v. *United States*, 295 U.S. 78, 88 (1935). But this rule was not violated here. As the court below stated (Pet.

App. 34a), "[w]here a substantial portion of the defense summation is devoted to attacks upon government witnesses, with stress on their cooperation, the prosecutor is entitled to make an appropriate response." See, *e.g.*, *United States* v. *Ivey*, 550 F.2d 243 (5th Cir.), cert. denied, 431 U.S. 943 (1977); *United States* v. *Stofsky*, 527 F.2d 237, 249 (2d Cir. 1975), cert. denied, 429 U.S. 819 (1976); *United States* v. *Crouch*, 528 F.2d 625, 633 (7th Cir.), cert. denied, 429 U.S. 900 (1976). Here, the prosecutor simply responded to defense attacks on the credibility of the government's witnesses by arguing that the witnesses' credibility was supported by the record. He did not assert any personal knowledge of their credibility or suggest any extra-record support for the government's testimony.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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